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Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

HUGO PRINCZ,
Petitioner,

v.

THE FEDERAL REPUBLIC OF GERMANY,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a district court order denying a motion to dismiss by reason of foreign sovereign immunity is immediately appealable under the collateral order doctrine, and whether the notice of such an appeal automatically stays all proceedings below.

2. Whether, when a foreign government deliberately fails to honor the validity of United States passports for reason of the race, religion, or national origin of the United States citizen passport holders, intentionally commits acts of genocide, extrajudicial killing, torture and enslavement against the passport holders, and thereafter refuses to negotiate reparations for such conduct with the Department of State, the foreign government has implicitly waived its foreign sovereign immunity within the meaning of 28 U.S.C. § 1605(a)(1).

3. Whether, when a foreign sovereign engages in slavery as a regular course of commercial conduct and in the course of that commercial conduct enslaves a United States national by leasing his person to for-profit commercial concerns for a daily rate and when the materials produced by the commercial concerns were sold for profit to the foreign sovereign for use in a war effort against the United States, the nature of the foreign government's conduct constitutes commercial activity having a direct effect in the United States within the meaning of 28 U.S.C. § 1605(a)(2).

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IN THE

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Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR WRIT OF CERTIORARI

Hugo Princz petitions the Court that a writ of certiorari issue to review the judgment rendered in this case by the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The Opinion of the Court of Appeals on jurisdiction under the Foreign Sovereign Immunities Act (App. C, 3a-42a) is reported at 26 F.3d 1166 (1994). The Opinion of the Court of Appeals on appellate jurisdiction under the collateral order doctrine (App. E, 44a - 45a) is reported at 998 F.2d 1 (1993). The Opinion of the United States District Court for the District of Columbia on jurisdiction under the Foreign Sovereign Immunities Act (App. G, 50a - 63a) is reported at 813 F. Supp. 22 (1992).

JURISDICTION

The judgment of the Court of Appeals was entered July 1, 1994 (App. C, 3a). The petitioner's timely petition for rehearing and suggestion for rehearing *in banc* were denied on August 22, 1994 (App. B, 2a, App. A, 1a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

§ 1291. Final decisions of district courts

The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States, ...

§ 1292. Interlocutory decisions

(b) When a district court judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

§ 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

The Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§ 1330, 1391(f), 1602-1611, reads in relevant part as follows:

§ 1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

§ 1603. Definitions

For purposes of this chapter —

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case —

> (1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

STATEMENT

Germany committed acts of genocide, extrajudicial killing, torture and enslavement against an American family.

Petitioner Hugo Princz and his family were United States citizens residing in Europe at the outbreak of the Second World War. Mr. Princz and his family were arrested as enemy aliens of the German government approximately ninety days after the bombing of Pearl Harbor. Because petitioner and his family were Jewish Americans, the government of Germany, over the protestations of Mr. Princz' father, refused to honor the validity of their passports and failed to return the Princz family to the United States as part of an International Red Cross civilian prisoner exchange; instead, they were sent to concentration camps. Petitioner Hugo Princz' father, mother and sister were exterminated at Maidenek. Petitioner and his two younger brothers were transported, by cattle car, to Auschwitz to serve as slave laborers. There they were registered as Jewish Americans — "Juda USA" — and furnished with prison garb stenciled "USA" across the chest. Mr. Princz and his two brothers persons' were leased by the German government to the private German chemical cartel I.G. Farben, where they worked as laborers at chemical production facilities.

At Auschwitz, in separate incidents, Mr. Princz was forced to watch helplessly while his two injured brothers were intentionally starved to death. From Auschwitz he was shipped to the Warsaw Ghetto by rail and was subsequently transferred, by death march, to the Dachau slave labor facility where his person was leased to the Messerschmidt aircraft company as a laborer.

In the closing days of the war, Germany elected to exterminate certain slave laborers, including Mr. Princz, in an effort to destroy incriminating evidence of war crimes. Hours before his scheduled execution, United States armed forces liberated the train carrying him toward an extermination camp. The liberating soldiers recognized Mr. Princz as an American by the designation "USA" that the Germans had stenciled on his camp garb. Desiring that he receive the best possible care, the United States Army sent him to an American military hospital for treatment. That act probably saved Mr. Princz' life. However, since he was never processed through a Center for Displaced Persons, Germany also used that act to justify its denial of reparations for Mr. Princz.

After recuperating, Mr. Princz was given permission to reenter Communist-occupied Czechoslovakia to search for his immediate family members and to inventory the remains of his father's business holdings.[1] Upon determining that the other members of his immediate family had not survived, Mr. Princz traveled to the United States to be with his relatives.

Germany rebuffed all diplomatic efforts to include Mr. Princz, the only known Nazi death camp survivor imprisoned as an American, within its reparations programs.

After the war, the German government established a reparations program for "survivors," to which Mr. Princz made timely application in 1955. Germany alleges contributions to the program have exceeded 60 billion United States dollars. Mr. Princz, however, was denied reparations, including participation in a pension program for survivors, solely because he was a U.S. national at the time he was a slave laborer in the camps.[2]

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[1] Czech communists later expropriated all U.S.-owned assets in Czechoslovakia. Mr. Princz eventually received a prorated share of the value of the assets expropriated in the amount of approximately $11,000. *In the matter of Hugo Princz, Dora Princz Schwartz, and Isidor Princz*, Foreign Claims Settlement Commission of the United States, Decision No. CZ-3464 (Sept. 14, 1962).

Despite the diplomatic efforts of the Reagan, Bush and Clinton Administrations, the German Government has steadfastly denied Mr. Princz reparations. Diplomatic efforts were initiated by the Reagan Administration in 1983 at the request of the New Jersey congressional delegation. With the signing and subsequent ratification of the Treaty on the Final Settlement with Respect to Germany and a Related Agreed Minute (*in force* March 15, 1991) on September 12, 1990, Mr. Princz' diplomatic remedies were apparently exhausted. During the advice and consent process for the treaty, the Senate Foreign Relations Committee studied Mr. Princz' claim. At the request of Senator Helms, the Committee's ranking Republican, the Bush administration agreed to make a final, and ultimately unsuccessful, diplomatic effort on behalf of Mr. Princz. In order to avoid complicating the diplomatic process, the Department of State requested that Mr. Princz delay the commencement of litigation. Mr. Princz complied with the Department's request and delayed filing the complaint for approximately sixteen months, until just under one year from the Treaty's entry into force.

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[2] As a United States national during the war, Mr. Princz is not eligible because (1) he was not a German citizen; (2) he was not a stateless person resident in a Displaced Persons Center in Germany on 1 January 1947 (as a United States national he was free to leave at any time his medical condition would allow); and (3) he was not a national of one of the seventeen countries Germany occupied during the war and with which Germany subsequently concluded bilateral treaties making block settlements of claims.

After exhausting diplomatic remedies, Mr. Princz commenced litigation in the United States District Court and Germany's assertion of foreign sovereign immunity was denied.

After exhausting all available diplomatic remedies, on March 12, 1992, Mr. Princz commenced an action in tort and in quasi-contract before the United States District Court for the District of Columbia. In lieu of filing an answer, Germany filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction, asserting foreign sovereign immunity. The German government's Motion to Dismiss was denied by Memorandum Opinion and Order entered December 23, 1992 (App. G, 50a - 63a). In denying Germany's motion to Dismiss, the District Court determined that neither Congress when enacting the Foreign Sovereign Immunities Act nor this Court when it considered *Argentine Republic* v. *Amerada Hess*, 488 U.S. 428 (1989), contemplated a factual scenario of this nature, and thus concluded that neither the *Amerada Hess* decision nor the Act barred this suit (App. G, 56a - 57a). The District Court scheduled the case for trial.

The Court of Appeals reversed by divided opinion, granting Germany immunity for acts of genocide, extrajudicial killing, torture and enslavement.

Germany appealed pursuant to 28 U.S.C. § 1291. The Court of Appeals denied a motion to dismiss for lack of appellate jurisdiction, holding that a denial of foreign sovereign immunity was immediately appealable under the collateral order doctrine and that the filing of the notice of appeal automatically stayed proceedings in the District Court (App. E, 44a - 45a). Germany also asked the United States to file an *amicus* brief in support of immunity. The State Department declined and admonished the German government to settle Mr. Princz' "legitimate and compelling claim." United States Department of State's Response to Note Verbale

No. 22/93 (April 13, 1993).[3]

The Court of Appeals reversed the District Court by divided opinion, holding that the Foreign Sovereign Immunities Act did apply to this case, but that none of the enumerated exceptions to foreign sovereign immunity, particularly those for commercial activity and implied waiver, existed.

With regard to the commercial activity exception, the majority below appears to concede that the enslavement of Mr. Princz was a commercial act, but rejected the commercial activity exception, holding that there was no direct effect of that activity in the United States because: there were necessarily many intervening steps between Hugo Princz' forced labor in German war materials plants and any effect thereof in the United States; and Hugo Princz' recuperation in an American military hospital and his subsequent efforts to find remaining family members, which delayed his return to the United States for approximately one year, by necessity, rendered the effects of his incarceration and enslavement indirect within the meaning of the Act (App. C, 13a - 16a).

With regard to the implied waiver exception, the majority below determined that Germany's treatment of Mr. Princz to be a *jus cogens* violation, but stated: that in the absence of an express Congressional directive to consider violations of *jus cogens* norms as implied waivers of foreign sovereign immunity, it would not impute to Congress the intent to subject a foreign government to the jurisdiction of the federal courts, even in these circumstances (App. C, 20a n.1); and that the *jus cogens* theory of waiver was incompatible with the "intentionality requirement" of § 1605(a)(1), and thus it would not impute to Germany, by its commission of such atrocities against an American family alone, any intention to submit itself to the jurisdiction of the federal courts (App. C, 19a - 20a).

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[3] Embassy of the Federal Republic of Germany, Washington, D.C., to the United States Department of State, Office of the Legal Advisor (March 11, 1993) (Affixed to Appellee's Brief in the Court of Appeals at page 10 of the Addendum).

Judge Wald, in dissent below, also concluded that the Foreign Sovereign Immunities Act applied to this case and also found Germany's treatment of Mr. Princz to be a *jus cogens* violation. Differing from the majority, however, the dissent determined that the violation of *jus cogens* norms gave rise to an implied waiver of foreign sovereign immunity within the meaning of §1605(a)(1) (App. C, 31a - 42a). In reaching this conclusion, the dissent below considered several factors:

(1) that foreign sovereign immunity is a matter of grace and comity rather than a Constitutional right (App. C, 35a, *citing Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 486 (1983));

(2) that the international community and the Executive Branch of the United States government refused to recognize German sovereignty for acts of genocide, extrajudicial killing, torture, and enslavement and, has on other occasions refused to recognize the sovereignty of a state which has violated *jus cogens* norms (App. C, 36a - 38a);

(3) that there exists a longstanding canon of statutory construction that domestic law be construed wherever possible in a manner consistent with international law (App. C, 38a, *citing The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804));

(4) that Congress intended to create a statutory regime which incorporated international legal standards (App. C, 39a, *citing* H.R. REP. NO. 1487, 94TH CONG., 2D SESS. at 14, *reprinted in* 1976 U.S.C.C.A.N. 6604, 6613), that there is no indication that Congress intended to exclude *jus cogens* violations from the scope of § 1605(a)(1) (App. C, 39a); and that the

examples provided in the legislative history of the implied waiver provision are neither exclusive nor exhaustive (App. C, 39a - 40a);

(5) that the implicit intentionality requirement of the implied waiver provision does not so much require the contemplation of being haled into a United States federal court as it requires that it would be held accountable for its actions (App. C, 40a - 41a); and

(6) that the exercise of jurisdiction over this case would not create a judicial interference with the notions of grace and comity between nations which underlie the Foreign Sovereign Immunities Act (App. C, 41a - 42a).

REASONS FOR GRANTING THE WRIT

The decision below raises fundamental and recurring questions about the proper interpretation of the Foreign Sovereign Immunities Act ("FSIA"). As a practical matter, those questions are now definitively settled because the statute creates a strong jurisdictional bias in favor of bringing FSIA cases in the District of Columbia Circuit. Unless this Court grants this petition for certiorari, continued application of the collateral order doctrine to FSIA cases will impede the orderly resolution of this class of cases (which includes a large number of routine commercial disputes) contrary to the intent of Congress and contrary to this Court's precedents. No less important, the Court should grant the writ in order to prevent the misconstruction of the "implied waiver" provision of the FSIA—a misconstruction that cuts off what Judge Wald (dissenting below) called "the last resort" for American victims of violations of the laws of nations. Finally, this Court should clarify the limits of the FSIA's "commercial activity" exception in order to prevent further waste of private and judicial resources in what has become an unsettled area of the law.

I. THE COURT OF APPEALS, BY HOLDING FOREIGN SOVEREIGN IMMUNITY DETERMINATIONS AMENABLE TO COLLATERAL ORDER DOCTRINE APPEALS, HAS DECIDED A FEDERAL QUESTION IN CONTRAVENTION OF AN ACT OF CONGRESS AND IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

The judicial extension of the collateral order doctrine to foreign sovereign immunity determinations affects large numbers of cases every year,[4] the majority of which concern routine commercial disputes. The availability of collateral order doctrine review of foreign sovereign immunity determinations affects *all* cases brought under the Foreign Sovereign Immunities Act by delaying a foreign state's impetus to settle until after full appellate review of the district court's jurisdiction. Approximately ninety percent of federal question cases settle prior to the completion of the pretrial phase of litigation.[5] Settlement discussions in FSIA cases, absent the application of the collateral order doctrine, would also be most likely to occur at this time. Instead, an appeal under the collateral doctrine has become standard practice for foreign states whose motions to dismiss for lack of subject matter jurisdiction have been denied.

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[4] In the first ten years following the Act's passage, approximately 2000 cases were filed against foreign states. JOSEPH W. DELLAPENNA, SUING FOREIGN GOVERNMENTS AND THEIR CORPORATIONS vi (1988). Since January 1988, the federal district courts have made over forty foreign sovereign immunity determinations each year. A search on Westlaw revealed 272 foreign sovereign immunity determinations in the federal district courts between January 1, 1988 and November 10, 1994.

[5] Of 10,263 assorted federal question cases pending between July 1, 1993 and June 30, 1994, 2,160 settled before any court action. Of the remaining 8,103 cases, 6,724 settled before the pretrial phase, leaving 1,136. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, STATISTICS DIVISION, ANALYSIS AND REPORTS BRANCH, TABLE C4 - UNITED STATES DISTRICT COURTS CIVIL CASES TERMINATED BY NATURE OF SUIT AND ACTION TAKEN (LAND CONDEMNATION CASES OMITTED) DURING THE TWELVE MONTH

The collateral order doctrine is not necessary to protect the foreign state from harassing litigation or from incorrect determinations by the district courts. Foreign governments, like private party litigants, could still appeal the denial of their motion to dismiss on an interlocutory basis, with the certification of the trial judge. 28 U.S.C. § 1292(b). If the trial judge refuses to certify, relief may be obtained at the appellate level. Under the All Writs Act, 28 U.S.C. § 1651(a), a Court of Appeals may in its discretion grant a writ compelling the trial judge to certify the issue for interlocutory appeal, upon a showing of error.

Concerns of potential interference with foreign relations similarly provide no basis for the judicial construction extending the collateral order doctrine to encompass FSIA cases. In cases where the Department of State is concerned about the impact of litigation upon the conduct of foreign relations, it has noticed the courts to that effect. *See, e.g.*, *Jackson* v. *People's Republic of China*, 794 F.2d 1490 (11th Cir.), *reh'g and reh'g en banc denied*, 801 F.2d 404 (1986), *cert. denied*, 480 U.S. (1987); *Segni* v. *Commercial Office of Spain*, 816 F.2d 344 (7th Cir.), *reh'g denied*, (May 26, 1987); *Von Dardel* v. *U.S.S.R.*, 623 F. Supp. 246 (D.D.C. 1985), *vacated* 736 F. Supp. 1 (D.D.C. 1990). Germany asked the Department of State to issue a Statement of Interest on its behalf in this matter, and the Department refused to do so, instead admonishing Germany to settle Mr. Princz' "legitimate and compelling claim." United States Department of State's Response to Note Verbale No. 22/93, *supra* note 3.

PERIOD ENDED JUNE 30, 1994 (category: other federal questions).

Furthermore, prior to the commencement of litigation, Germany could have responded favorably to any of the several diplomatic overtures on Mr. Princz' behalf, thus precluding litigation altogether. *The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801); *reaffirmed*, *Dames & Moore* v. *Regan*, 453 U.S. 654, 685 (1981). In this case, diplomatic remedies have been exhausted, and thus the conduct of foreign relations no longer has any significance for this case.

The application of the collateral order doctrine to FSIA cases results in the interlocutory appellate review of *all* foreign sovereign immunity determinations, even those involving routine commercial disputes in which the correct interpretation of the statute is not a close question. Appellate review under the collateral order doctrine allows foreign states to use a such an appeal as a dilatory tactic to wear down plaintiffs with prohibitive cost and time expenditures.[6] This results in unnecessary delays to a determination on the merits and the waste of private and judicial resources in *all* FSIA cases. *See, e.g.*, *Linton* v. *Airbus Industrie*, 30 F.3d 592 (5th Cir), *reh'g and reh'g en banc denied*, 36 F.3d 92 (1994) (Petition for Certiorari pending, No. 94-684). For many commercial claims, particularly those of the individual or small business plaintiff, these costs may simply be prohibitive, thus effectively denying an entire class of plaintiffs a reasonable opportunity to adjudicate without regard to the merits of their claims.

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[6] The median duration of federal appeals in 1990, from the filing of the notice of appeal to the final disposition, was 10.1 months, with a high of 16 months in the Ninth Circuit and a low of 6 months in the Third Circuit. Thomas E. Baker & Denis J. Hauptly, *Taking Another Measure of the "Crisis of Volume" in the U.S. Courts of Appeals*, 51 WASH. & LEE L. REV. 97, 102 & n.38 (1994). By 1992, the median duration had increased to 10.6 months. Michael C. Gizzi, *Examining the Crisis of Volume in the U.S. Courts of Appeals*, 77 JUDICATURE 96, 98 (1993) (*citing* ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL COURT MANAGEMENT STATISTICS 1992).

The confusion resulting from this judicially extended doctrine is plainly contrary to the intent of Congress in enacting the FSIA, which was to provide "*comprehensive* provisions in our law . . . to inform parties when they can have recourse to the courts to assert a legal claim against a foreign state", particularly for "ordinary legal disputes" in the commercial context. H.R. REP. 1487, 94TH CONG., 2D SESS. at 6-7, *reprinted in* 1976 U.S.C.C.A.N. 6604, 6605 (emphasis added). As adequate remedies exist pursuant to certification, 28 U.S.C. § 1292(b), and writ of mandamus, 28 U.S.C. § 1651(a), for those close questions which truly merit interlocutory appeal, the extension of the collateral order doctrine to FSIA cases is superfluous and imposes unnecessary hardship upon private litigants in this entire class of cases.

The question thus is whether, absent an express grant of authority from Congress, foreign sovereigns may afford themselves the privilege of 28 U.S.C. § 1291 appeals under the collateral order doctrine or whether interlocutory appeals taken from orders of the district courts must be made under 28 U.S.C. § 1292(b). Neither the express language of the statute nor its legislative history unambigously resolves the issue.

It may be reasonably inferred, both from the Opinion of the Court of Appeals and from the Act's legislative history, that the FSIA sets forth comprehensive substantive and procedural standards controlling all suits brought against foreign nations in state and federal courts of the United States. The FSIA sets forth detailed procedural rules for suits against foreign states, including special rules governing venue (§ 1391(f)), jury trial (§ 1330(a)), service of process (§ 1608(a)), time to answer complaints (§ 1608(d)), counterclaims (§ 1607), punitive damages (§ 1606), default judgments (§ 1608(e)), procedures by which a foreign sovereign may remove actions from state courts (§ 1441(d)) and detailed procedures for execution upon foreign state-owned property (§§ 1609-1611). Each of these procedural rules operates for the protection and convenience of foreign state defendants.

Noticeably absent from any special procedural protections are matters associated with the taking of appeals. Where, unlike private parties, foreign states are afforded the same expanded timeliness requirements as the government of the United States with respect to the answering of complaints, *compare* 28 U.S.C. § 1608(d) and Fed.R.Civ.P. 12(a), they enjoy no such analogous procedural advantage with respect to the time for filing appeals. Nor is there any reason to conclude that Congress intended to afford foreign sovereigns the special privilege of collateral order doctrine appeals. Unlike the immunity afforded to United States government officials under the Eleventh Amendment, foreign sovereign immunity is not a Constitutional right; it is a privilege afforded foreign states by Act of Congress.[7] The substantive and procedural rights afforded a foreign sovereign in the assertion of its immunity are limited by the terms of the statute granting the immunity – The Foreign Sovereign Immunities Act, which does not provide for appeals under 28 U.S.C. § 1291.[8]

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[7] Those Circuits which have applied the collateral order to foreign sovereign immunity determinations, by relying directly or indirectly on *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985), have also concluded that the foreign state's right to immunity is analogous to a United States government official's Eleventh Amendment immunity from suit. *See, e.g., Weltover* v. *Republic of Argentina*, 941 F.2d 145 (2d Cir. 1991), *aff'd on other grounds*, 112 S. Ct. 2160 (1992); *Stena Rederi AB* v. *Comision de Contratos del Comite*, 923 F.2d 380 (5th Cir. 1991); *Foremost-McKesson* v. *Islamic Republic of Iran*, 905 F.2d 438, 443 (D.C. Cir. 1990); *Rush Presbyterian-St. Luke's Medical Center* v. *The Hellenic Republic*, 877 F.2d 574, 576 n.2 (7th Cir. 1989); *Marx* v. *Government of Guam*, 866 F.2d 294, 296 n.2 (9th Cir. 1989); *Gould* v. *Pechiney Ugine Kuhlmann*, 853 F.2d 445, 450 (6th Cir. 1988). *See also Pullman Construction Industries, Inc.* v. *United States*, 23 F.3d 1166, 1168-69 (7th Cir.), *reh'g and reh'g en banc denied*, (May 19, 1994) (dicta).

This question is not unlike that faced in *Argentine Republic* v. *Amerada Hess,* 488 U.S. 428 (1989), where the Court determined that Congress' failure to enact a *pro tanto* repealer of the Alien Tort Statute in the FSIA did not affect the grant of foreign sovereign immunity in the FSIA, as the comprehensiveness of the Act was "intended to preempt any other State and Federal law (excluding applicable international agreements) for according immunity to foreign sovereigns." 488 U.S. at 437-38. The result should be the same here.

Even if, in appropriate cases, foreign sovereign immunity determinations are subject to collateral order doctrine appeals, that cannot be the case here. Jurisdiction in this and other such similarly-situated matters is limited solely to that small group of interlocutory orders which qualify for appellate review in the absence of a final order under the collateral order doctrine. *Cohen* v. *Beneficial Industrial Loan Corporation*, 337 U.S. 541 (1949). "To come within the 'small class' of . . . *Cohen*, the order must [1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Puerto Rico Aqueduct and Sewer Authority* v. *Metcalf & Eddy*, 113 S. Ct. 684, 688 (1993) (quoting *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978)).

Cohen's three pronged test cannot be met here. The District Court was circumspect in characterizing the circumstances of this case as mere allegations (App. G, 51a), conditioning its decision upon Mr. Princz proving his allegations by the usual burdens of proof in civil matters. Not surprisingly, neither the District of Columbia Circuit nor any other Circuit has previously considered the application of the collateral order doctrine to a matter involving an order predicated upon factual allegations which are "'enmeshed in the factual and legal issues comprising the plaintiff's cause of action,' *Mercantile Nat. Bank* v. *Langdeau*, 371 U.S. 555, 558." *Coopers & Lybrand*, 437 U.S. at 469 (footnote omitted), where the fact sensitive inquiry necessarily treads upon the same evidence as will be presented at trial. *Green* v. *Department of Commerce,* 618 F.2d 836, 840 (1980). *Cf. Foremost-McKesson, Inc.* v. *Islamic Republic of Iran*, 905 F.2d 438 (D.C. Cir. 1990) (reviewing a pure question of law). *See also In re Durensky*, 519 F.2d 1024, 1029 (5th Cir. 1975) (*citing American Fire and Casualty Co.* v. *Finn*, 341 U.S. 6, 17-18 (1951) ("An order denying a motion to dismiss for lack of jurisdiction is perhaps unique in its incapacity permanently to affect the rights of the moving party, for jurisdictional defects may be recognized by the court at any time, on the motion of the parties or on its own motion.")); *Mansfield, Coldwater & Lake Michigan Ry.* v. *Swan*, 111 U.S. 379, 382-83 (1884).

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[8] The FSIA, *inter alia*, codified the federal common law doctrine of foreign sovereign immunity. H.R. Rep. 1487 at 7, 1976 U.S.C.C.A.N. at 6605. Petitioner knows of no case prior to the FSIA's enactment in which the collateral order doctrine was applied to a foreign sovereign immunity determination.

The appellate court granted Germany a right that even the United States federal government has not reserved to itself under the various statutory waivers to its immunity. *Pullman Construction Industries, Inc.* v. *United States*, 23 F.3d 1166, 1168-70 (7th Cir.), *reh'g and reh'g en banc denied*, (May 19, 1994) ("Does the word 'immunity' in 'sovereign immunity' itself support interlocutory appeal? Surely not, as the Court held in *Van Cauwenberghe*"). The Court, in *Van Cauwenberghe* v. *Biard*, 486 U.S. 517 (1988), determined that "[t]he critical question following *Mitchell* [v. *Forsyth*], is whether 'the essence' of the claimed right is a right not to stand trial. *Mitchell*, 472 U.S. at 525," 486 U.S. at 524, and in the absence thereof, whether the mere allegation of the absence of personal jurisdiction as a result of immunity confers such a right. *Id.* at 526. In *Van Cauwenberghe*, as here, the underlying issue involved international comity between states: there, the obligation of a receiving state not to abuse the extradition process of the extraditing state, *id.* at 525; and here, the obligation of the forum state not to allow a foreign state to be subjected to unnecessary litigation. For reasons equally valid in both matters, principally that defendant will be represented by counsel and will not even be required to make an appearance at trial, the Court in *Van Cauwenberghe*, "conclude[d] that the right not to stand trial in a civil suit is not an essential aspect of a claim of immunity under the principle of specialty." *Id.* at 526. The result here should be the same, as review of jurisdiction may be had, if necessary, following a determination on the merits of the claim.

Without commenting on the merits, the United States found the order affirming the application of the collateral order doctrine to foreign sovereign immunity determinations and the attendant automatic stay of proceedings below to be of such significance that it petitioned the Court of Appeals to publish its order. Motion of the United States of America for Publication of this Court's [D.C. Circuit] April 14, 1993 Order (App. H, 64a - 67a). A decision of such widespread consequences, which has no statutory basis and is contrary to decisions of this Court, should be corrected.

II. THE COURT OF APPEALS, BY ERRONEOUSLY CONCLUDING THAT FOREIGN STATES WHICH COMMIT *JUS COGENS* VIOLATIONS AGAINST UNITED STATES NATIONALS ENJOY IMMUNITY FROM SUIT IN U.S. COURTS, HAS DECIDED A FEDERAL QUESTION IN CONTRAVENTION OF AN ACT OF CONGRESS AND INTERNATIONAL LAW, AND IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

The protection of U.S. nationals from international terrorism and the satisfaction of claims arising from such attacks is an ongoing concern for the Department of State and the Executive.[9] Although the President and the Department of State do their utmost to press individual claims such as these, they are minor issues in comparison with the complex daily bilateral relations between states.

Congress enacted the FSIA in order to guarantee, where appropriate, the availability of an "urgently needed" forum for the determination of claims against foreign states which would be independent from the daily pressures of foreign relations, so that individual claims would not be lost among issues of greater national significance. H.R. REP. NO. 1487 at 7-9, *reprinted in* 1976 U.S.C.C.A.N. at 6605-6607. Congress recognized the practical difficulties of the Department's dual role in formulating the FSIA:

> A principal purpose of this bill is to transfer the determination of sovereign immunity from the

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[9] Over the last ten years, international terrorism resulted in 1701 United States casualties, of which 302 were fatalities. UNITED STATES DEPARTMENT OF STATE, OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, CASUALTIES CAUSED BY INTERNATIONAL TERRORISM, 1980-1993 (April 1994). To the best of petitioner's knowledge, there is no data available for casualties resulting from *jus cogens* violations other than terrorism.

> executive branch to the judicial branch, thereby *reducing* the foreign policy implications of immunity decisions and assuring litigants that these often crucial decisions are made *on purely legal grounds* and under procedures that ensure due process.

Id. at 7, *reprinted in* 1976 U.S.C.C.A.N. at 6606 (emphasis added). In the broad scheme of U.S.—German bilateral relations, the matter of reparations for Mr. Princz is a minor issue. Mr. Princz' claim provides an example of a "legitimate and compelling claim," *see* United States Response to Note Verbale 22/93, *supra* note 3, which, presumably because of the priority of other foreign policy issues, the Department of State pressed with less than its utmost vigor. This case thus falls precisely within that class of claims which Congress intended to protect by enacting the FSIA.

The majority and dissenting opinions below in this case concur that the acts committed by Germany against Mr. Princz were violations of *jus cogens* norms (App. C, 19a-20a, 27a), principles of international law "from which no derogation is permitted." (App. C, 17a, 31a). The appellate panel members disagree, however, as to whether *jus cogens* violations constitute an implied waiver of foreign sovereign immunity within the meaning of § 1605(a)(1) of the Foreign Sovereign Immunities Act (FSIA) (App. C, 16a-20a, 31a-42a).

Ostensibly, the majority and dissent below reach their differing interpretations as a matter of statutory construction (App. C, 18a-20a, 40a-41a). Yet the majority's chosen interpretation of § 1605(a)(1) demonstrates that its decision was not controlled by the FSIA's construction or its sparse legislative history. Instead, the majority decision was controlled by an overriding concern that such a decision would give rise to a torrent of foreign human rights litigation (App. C, 20a n.1). The majority's concerns are ill-founded because they are based on a misapprehension of the applicable law.

Any statutory interpretation flowing therefrom is necessarily ill-conceived.

The majority's error stems from its failure to examine and apply the nature of "comity" to the foreign sovereign immunity determination:

> "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its citizens or of other persons who are under the protection of its laws.

Hilton v. Guyot, 159 U.S. 113, 163-64 (1894). By its nature, comity is a voluntary bilateral recognition by one nation for the acts of another and provides the basis for the existence of foreign sovereign immunity. *Cf. Foremost-McKesson*, 905 F.2d at 445. *Jus cogens* violations are so offensive to the bilateral comity between the nations involved that they give rise *per se* to an implied waiver of immunity by the offending sovereign. A subsequent refusal to negotiate a binding settlement of the claim in good faith with the injured national's government exacerbates the breach of comity between the two states.

The offense to comity between nations in this case lies only between the United States and Germany. The infliction of *jus cogens* violations by Germany, the torture and enslavement of petitioner, does not afford him the right to bring a civil action before the courts of any of the member states of the United Nations. To the contrary, the German infliction of *jus cogens* violations upon a passport-bearing United States national breached the bilateral comity between these two nations. Germany subsequently refused to accommodate the Department of State in an attempt to reach a diplomatic settlement, which amplified the breach of comity. This refusal to negotiate perpetuated the breach of comity between the United States and Germany with regard to this matter, thus confirming the implied waiver of Germany's foreign sovereign immunity in United States courts.

Claims by "the victims of all the ruthless military juntas, presidents-for-life, and murderous dictators of the world, from Idi Amin to Mao Zedong" (App. C, 20a n.1) would *not* be permitted unless their victims were United States nationals. No matter how tragic the human suffering caused by such conduct, it would not offend the bilateral comity between the United States and the sovereign *jus cogens* violator. The majority's supposed torrent of foreign human rights litigation, necessarily brought under the Alien Tort Statute, would continue to be precluded by the teachings of *Argentine Republic* v. *Amerada Hess*, 488 U.S. 428, 438 (1989). *Accord, Siderman de Blake* v. *Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1812 (1993) (declining to assert jurisdiction where the Argentine government committed *jus cogens* violations upon one of its own nationals, although jurisdiction was asserted on other grounds); *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985) (declining to assert jurisdiction over an action for money damages resulting from a Libyan-sponsored terrorist attack in Israel where the intended victims were Israeli nationals).

The dissent below, citing *The Paquete Habana*, 175 U.S. 677, 700 (1900), *The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804), *MacLeod* v. *United States*, 229 U.S. 416, 434 (1913), and *Filartiga* v. *Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980), correctly concluded that international law is part of the law of the United States, that Congress intended the FSIA to "incorporate[ ] standards recognized under international law" and that the court should at least make an effort to construe the FSIA consistent with the *jus cogens* norms of international law (App. C, 39a). If *jus cogens* norms are universally-recognized principles of international law, the only way to interpret the FSIA in accordance with international law is to construe the Act to encompass an implied waiver exception for *jus cogens* violations (App. C, 39a). This conclusion is the straightforward result of standard principles of statutory construction.

The majority below attempts to avoid this conclusion by stating "it is also our law that a federal court is not competent to hear a claim arising under international law absent a statute granting such jurisdiction." (App. C, 20a n.1). This statement is made in the absence of any reasoned effort to reconcile the FSIA with universally-recognized principles of international law,[10] and thus is in direct conflict with this Court's holdings that, wherever possible, a statute should be construed in a manner consistent with international law. *Weinberger* v. *Rossi*, 456 U.S. 25, 32 (1982); *McCulloch* v. *Sociedad Nacional*, 372 U.S. 10, 21-22 (1963); *MacLeod* v. *United States*, 229 U.S. 416, 434 (1913); *The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

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[10] The majority argues that implied waiver requires some intentional act analogous to the examples found in the legislative history: an arbitration agreement or a choice of law provision (App. C, 19a). Although the petitioner disagrees with the majority's interpretation of the intentionality requirement, even under their reading of the statute, history does not bear out the majority's conclusion "that [n]either the present government of Germany [n]or the predecessor government of the Third Reich actually indicated, even implicitly, a willingness to waive immunity arising out of the Nazi atrocities." (App. C, 19a-20a). Germany surrendered to the Allies unconditionally and subject to such terms as the Allies would impose. Surrender by Germany: Terms Between the United States of America and Other Allied Powers and Germany (May 8, 1945), 59 Stat. 1857 (1945); Agreement Regarding the Defeat of Germany: Additional Requirements (September 20, 1945), § 3 ¶ 5, 3 Bevans 1254 ("The Allied Representatives will regulate all matters affecting Germany's relations with other countries. No foreign obligations, undertakings or commitments of any kind will be assumed or entered into by or on behalf of German authorities or nationals without the sanction of the Allied Representatives.").

Only under limited circumstances is the conduct of a foreign sovereign so offensive to bilateral comity with the United States that it gives rise to an implied waiver of sovereign immunity within the meaning of § 1605(a)(1): 1) a *jus cogens* violation has been committed against a United States national; 2) the Department of State has determined the claim to be legitimate; *and* 3) the foreign state has refused to negotiate the claim in good faith with the Department of State. *Cf. Saudi Arabia* v. *Nelson,* 113 S. Ct. 1471 (1993) (no jurisdiction where the offending conduct was limited to an overzealous exercise of a legitimate police power); *Argentine Republic* v. *Amerada Hess*, 488 U.S. 428 (no jurisdiction where the violation of the laws of nations occurred against an alien corporation having no nexus with the United States). This rigorous test ensures that the district courts only hear claims under § 1605(a)(1) which give rise to true breaches of comity between the United States and the foreign state defendant, and that diplomatic remedies have been exhausted such that there is negligible interference with the conduct of foreign relations. These conditions are met in this case.

The abuse of Americans by foreign states in violation of the law of nations, as distinguished from the overzealous exercise of a legitimate police power, *Nelson*, 113 S. Ct. 1471, is a serious and recurring problem. Some Americans injured in this manner, in pursuing compensation for their injuries, have initiated cases against foreign states under the Foreign Sovereign Immunities Act. *See, e.g., Cicippio, et al.* v. *Islamic Republic of Iran*, 30 F.3d 164 (D.C. Cir. 1994) (Petition for Certiorari pending, No. 94 -730); *Smith, et al.*, v. *People's Socialist Libyan Arab Jamahiriya, et al.* (motion to dismiss pending in the United States District Court for the District of Columbia, No. 93-2568) (Pan Am Flight 103);

Hudson v. *People's Socialist Libyan Arab Jamhiriya* (pending in the United States District Court for the District of Columbia, No. 94-204) (Pan Am Flight 103). The court below has established a flawed analytical approach, and the strong dissent by Judge Wald highlights the need for guidance from this Court.[11] *See also Tel-Oren*, 726 F.2d at 775 (D.C. Cir. 1984) (Edwards, J., concurring) ("This case deals with an area of the law that cries out for clarification from the Supreme Court. We confront at every turn broad and novel questions about the definition and application of the 'law of nations.'").

III. THE COURT OF APPEALS, BY ERRONEOUSLY CONCLUDING THAT GERMANY'S ENSLAVEMENT OF AN AMERICAN CITIZEN THROUGH ITS LEASING OF HIS PERSON TO COMMERCIAL WAR MATERIALS MANUFACTURERS WAS NOT A COMMERCIAL ACTIVITY HAVING A DIRECT EFFECT IN THE UNITED STATES, HAS DECIDED A FEDERAL QUESTION IN CONTRAVENTION OF AN ACT OF CONGRESS.

As Justice Kennedy noted in *Nelson*, the "explicit language" of the FSIA does not limit the type of act which may give rise to an injury cognizable under the commercial activity exception. 113 S. Ct. at 1486 (Kennedy, Stevens and Blackmun, JJ., concurring in part and dissenting in part).

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[11] A disproportionate number of FSIA cases are brought in the District of Columbia Circuit because of the FSIA's venue provision, 28 U.S.C. § 1391(f), which ensures venue for these claims in the District of Columbia Circuit. For example, the *Cicippio* and *Smith* cases, respectively, involve Pennsylvania and Florida residents who brought their claims before the United States District Court for the District of Columbia Circuit.

Thus, claims sounding in tort can conceivably find a remedy through the commercial activity exception. In this case, Germany engaged in the commercial activity of leasing laborers, and Mr. Princz' claims arose from the course of these activities. Although the Court of Appeals did not determine whether Germany's slaving operations satisfied the Act's definition of commercial activity, it did distill the question into "a close one, viz. whether to pierce the sovereign veil, lest the purpose of the statute be frustrated by the machinations of a rogue government that in effect leases its immunity to a private party." (App. C, 14a). Mr. Princz' claims sounding in tort and in quasi-contract are based upon Germany's commercial relationship with private war materials manufacturers, and thus are based upon commercial activity within the meaning of the Act.

Federal courts have long struggled with the consideration of personal injury actions brought under the third clause of § 1605(a)(2), particularly with the determination of whether the commercial activity has had a direct effect in the United States. Over time, the courts settled on a "substantial and foreseeable" test gleaned from a reference in the legislative history to § 18 of the RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES (1965). This Court's decision in *Republic of Argentina* v. *Weltover* exacerbated the jurisprudential conundrum by rejecting the substantial and foreseeable test in favor of a test requiring that the effect be "an immediate consequence of defendant's . . . activity". 112 S. Ct. 2160, 2168 (1992) (citation omitted). That one sentence eviscerated the majority of the jurisprudence on the direct effects requirement in personal injury actions. The current direct effect test employed by most courts, including the majority below in this case (App. C, 14a), defines a direct effect

> [a]s one which has no intervening element, but rather flows in a straight line without deviation or interruption.

Upton v. *Empire of Iran*, 459 F. Supp. 264, 266 (D.D.C. 1978), *aff'd mem.*, 607 F.2d 494 (D.C. Cir. 1979). This construction provides scant guidance to the courts.

The Court has had occasion to clarify the definition of "direct effect" in other contexts. In commerce clause matters, for example, the Court held "the mechanical application of legal formulas [to define direct effect] no longer feasible." *Wickard* v. *Filburn*, 317 U.S. 111, 121-24 (1942). In *Wickard*, as in other cases, the Court has rejected the construction of a "direct effect" as requiring "the drawing of a mathematical line." *Santa Cruz Fruit Packing Co.* v. *N.L.R.B.*, 303 U.S. 453, 467 (1938) (Commerce Clause). *See also Kirshenbaum* v. *Walling*, 316 U.S. 517, 525-26 (1942) (Fair Labor Standards Act); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-5 at 310-11 (2d ed. 1988) (discussing "The Cumulative Effect Principle"). Similarly, for the FSIA, "[w]hat is needed is something of that common-sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of problems of causation." *Gully* v. *First National Bank*, 299 U.S. 109, 117 (1936) (discussing scope of federal "arising under" jurisdiction).

The private and judicial resources expended in addressing personal injury claims framed under the commercial activity exception demonstrates the importance of this question. Even if the Court determines that this question, standing alone, is not worthy of review, the recurring problems under the commercial activity exception make all the more imperative the elimination of the delays and uncertainties in FSIA litigation associated with the first two questions presented for review.

CONCLUSION

Although Mr. Princz' claim *vis-à-vis* Germany arose from events that are not likely to be repeated, the issues raised by the progress of his claim through administrative and diplomatic remedies, and the course of the litigation, transcend those unique circumstances. The availability of collateral order doctrine appeals of foreign sovereign immunity determinations unnecessarily prolongs the resolution of many claims and leads to a waste of private and judicial resources. Americans injured by foreign state violators of *jus cogens* will continue to seek remedies before the federal courts, and they will continue to plead exceptions to immunity under the implied waiver or the commercial activity provisions as warranted by the facts of their particular cases. The attendant delays and uncertainties frustrate litigants, judges, and most importantly, the intent of Congress in enacting the FSIA. This case provides an opportunity to resolve these issues. The Court should grant a writ of certiorari.

Respectfully submitted,

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APPENDIX C

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APPENDIX A

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 92-7247 **September Term, 1993**

USDC CV 92-0644

Hugo Princz,
Appellee,

v. Filed August 22, 1994

The Federal Republic
of Germany,
Appellant

and Consolidated Case No. 93-7006

BEFORE: Mikva, Chief Judge; Wald, Edwards, Silberman, Buckley, Williams, Ginsburg, Sentelle, Henderson, Randolph and Rogers, Circuit Judges

ORDER

Appellee's Suggestion For Rehearing In Banc has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court in banc, that the suggestion is denied.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK
BY: s/Robert A. Bonner
Deputy Clerk

APPENDIX B

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 92-7247 **September Term, 1993**

USDC CV 92-0644

Hugo Princz,
Appellee,

v. Filed August 22, 1994

The Federal Republic
of Germany,
Appellant

---

and Consolidated Case No. 93-7006

BEFORE: Wald, Ginsburg, and Sentelle, Circuit Judges

ORDER

Upon consideration of appellee's petition for rehearing, filed July 29, 1994, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK
BY: s/Robert A. Bonner
Deputy Clerk

Circuit Judge Wald would grant the petition for rehearing.

APPENDIX C

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 5, 1993 Decided July 1, 1994
As amended July 1, 1994

Nos. 92-7247 and 93-7006

HUGO PRINCZ,
APPELLEE

v.

FEDERAL REPUBLIC OF GERMANY,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(92cv00644)

Peter Heidenberger argued the cause for appellant. With him on the briefs were Thomas G. Corcoran, Jr. and Kathleen S. Rice, Washington D.C.

Steven R. Perles argued the cause for appellee. With him on the brief was David E. Sher, Arlington, VA.

On the brief for amici curiae The Anti-Defamation League, The Intern'l Ass'n of Jewish Lawyers and Jurists, and

Faculty Members of the American University, Washington College of Law, were Jill Kahn Meltzer, Sheldon H. Klein, David M. Levine, Steven M. Roth, and Warren L. Dennis.

Nicholas N. Kittrie entered an appearance for amicus curiae Washington College of Law.

Before WALD, GINSBURG, and SENTELLE, Circuit Judges.

Opinion for the Court filed by Circuit Judge GINSBURG.

Dissenting opinion filed by Circuit Judge WALD.

GINSBURG, Circuit Judge:

Hugo Princz, a Holocaust survivor, brought suit in the district court against the Federal Republic of Germany to recover money damages for the injuries he suffered and the slave labor he performed while a prisoner in Nazi concentration camps. The district court asserted subject matter jurisdiction over Mr. Princz's claim, and Germany appealed pursuant to 28 U.S.C. § 1292. *See Foremost McKesson v. Islamic Empire of Iran*, 905 F.2d 438, 443 (D.C. Cir. 1990) (district court's denial of foreign state's motion to dismiss on ground of sovereign immunity held immediately appealable).

We now hold, for the reasons set out below, that the district court does not have subject matter jurisdiction of Mr. Princz's claims. Assuming that the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602-1611, applies retroactively to events occurring in 1942-1945, no exception to the general grant of sovereign immunity in that statute applies in this case. If the FSIA does not apply retroactively, then there is no federal subject matter jurisdiction over Mr. Princz's claims, which sound in tort and quasi contract.

I. BACKGROUND

When the United States declared war against Nazi Germany in 1942, Hugo Princz, an American and a Jew, was living with his parents, his sister, and his two brothers in what is now Slovakia. The Slovak police arrested the entire Princz family as enemy aliens and turned them over to the Nazi SS. Rather than allow the Princz family to return to the United States as part of the civilian prisoner exchange then being conducted by the Red Cross, because they were Jews the SS sent them to concentration camps. Mr. Princz's parents and his sister were murdered at Treblinka, while Mr. Princz and his two younger brothers were sent to Auschwitz and then to Birkenau, where they were forced to work at an I.G. Farben chemical plant. After being injured at work, Mr. Princz's brothers were starved to death in the "hospital" at Birkenau. Mr. Princz was later marched to Dachau, where he was forced to work in a Messerschmidt factory. When United States soldiers liberated Mr. Princz at the end of the war, he was in a freight car full of concentration camp prisoners en route to another camp for extermination. The other liberated prisoners were sent to displaced persons camps, but because Mr. Princz is an American he was sent to an American military hospital for treatment.

After the war the government of the new Federal Republic of Germany established a program of reparations for Holocaust survivors. The German government denied Mr. Princz's 1955 request for reparations, however, because Mr. Princz was neither a German citizen at the time of his imprisonment nor a "refugee," within the meaning of the Geneva Convention, after the war. It appears that Mr. Princz would have qualified for reparations when the German government changed the criteria for eligibility in 1965, but he did not apply again before the statute of limitations ran in 1969.

Beginning in 1984 Mr. Princz, joined by the United States Department of State and members of the New Jersey congressional delegation, initiated a series of requests to the German government and the U.S. subsidiaries of I.G. Farben (BASF, Hoechst, and Bayer) for reparations in the form of *ex gratia* payments or the establishment of a pension fund; all such requests were denied. As the 1991 Treaty on the Final Settlement with Respect to Germany was awaiting ratification by the Senate, the Bush Administration attempted anew to resolve Mr. Princz's claim through diplomatic channels. That effort failed, as have the overtures that the Clinton Administration later made to the government of Germany.

In 1992, Mr. Princz finally resorted to federal district court, filing this action against Germany for false imprisonment, assault and battery, and negligent and intentional infliction of emotional distress, as well as recovery quantum meruit for the value of his labor in the I.G. Farben and Messerschmidt plants. After acceding to service of process, Germany moved to dismiss per Fed.R.Civ.P. 12(b)(1), asserting lack of subject matter jurisdiction owing to sovereign immunity, and under Rule 12(b)(6), asserting that Mr. Princz failed to state a claim upon which relief could be granted owing to the statute of limitations having run.

The district court held that it had jurisdiction of the case on the ground that the FSIA "has no role to play where the claims alleged involve undisputed acts of barbarism committed by a one-time outlaw nation which demonstrated callous disrespect for the humanity of an American citizen, simply because he was Jewish." 813 F.Supp. 22, 26 (D.D.C.1992). As we shall see below, that is not the law.

II. ANALYSIS

Germany argues that the district court lacks subject matter jurisdiction over Mr. Princz's complaint for damages sounding in tort and quasi contract because the FSIA is the only basis for obtaining jurisdiction over a foreign sovereign in the courts of the United States and this case comes within no exception to the rule of sovereign immunity codified in that Act. In the alternative, Germany argues that the FSIA does not apply retroactively to this case, and that Germany is therefore entitled to absolute sovereign immunity under the law of this circuit as it stood at the time the Nazis enslaved Mr. Princz. All of these questions concerning Germany's entitlement to sovereign immunity are matters of law for this court to consider *de novo*. *Commercial Bank of Kuwait v. Rafidain Bank*, 15 F.3d 238, 241 (2d Cir. 1994).

A. *What Law Applies?*

The FSIA was enacted in 1976. If it applies to this case, which arose from events occurring from 1942 to 1945, then it "provides the sole basis for obtaining jurisdiction over a foreign state in federal court." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439, 109 S.Ct. 683, 690, 102 L.Ed. 2d 818 (1989). Under the Act, the general rule is that of sovereign immunity, subject to various statutory exceptions.

If the FSIA does not apply to this case, then we are presumably remitted to the practice that prevailed in the federal courts during 1942-45, when the events now in suit occurred. During that time, indeed from 1812, when the Supreme Court decided *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 132, until 1952 the United States, as a matter of grace and comity, granted foreign sovereigns "virtually absolute immunity" from suit in the courts of this country. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486, 103 S.Ct. 1962, 1967, 76 L.Ed.2d 81 (1983). For their part, the courts

> consistently ... deferred to the decisions of the political branches—in particular, those of the

> Executive Branch—on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities.
>
> Until 1952, the State Department ordinarily requested immunity in all actions against friendly foreign sovereigns.

Id. (citations omitted).

In the first half of the 20th century the "restrictive" theory of sovereign immunity increasingly gained international acceptance. Restatement (Third) of The Foreign Relations Law of the United States, Ch. 5 p. 391 (1987). Under this approach immunity is confined to the sovereign or public acts of the foreign state and does not extend to its commercial or private acts. The Department of State embraced the restrictive theory of immunity in 1952. Letter from Jack B. Tate, Acting Legal Advisor, to Acting Attorney General Philip B. Perlman (May 19, 1952), reprinted in 26 Dept. State Bull. 984-85 (1952), and in *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 712-13, 96 S.Ct. 1854, 1869-70, 48 L.Ed.2d 301 (1976). Thereafter the State Department continued to advise courts on a case-by-case basis whether immunity should be granted; if in a particular case no advice was forthcoming, then the courts independently determined whether immunity was appropriate. *Jackson v. People's Republic of China*, 794 F.2d 1490, 1493 (11th Cir. 1986).

By enacting the FSIA in 1976, the Congress substantially codified the restrictive theory of sovereign immunity. *Commercial Bank of Kuwait*, 15 F.3d at 241; *Jackson*, 794 F.2d at 1493; H.R.Rep. No. 1487, 94th Cong., 2nd Sess. 7 (1976), U.S. Code Cong. & Admin.Serv. 1976, p. 6604. Neither the Supreme Court nor this court has yet determined, however, whether the Act applies that theory retroactively. Most courts that have considered the issue of retroactivity have held that FSIA does not apply to events occurring before issuance of the Tate Letter in 1952. *See Carl Marks & Co., Inc. v. Union of Soviet Socialist Republics*, 841 F.2d 26 (2d Cir. 1988); *Jackson v. People's Republic of China*, 794 F.2d 1490, 1497-98 (11th Cir. 1986); *Slade v. United States of Mexico*, 617 F.Supp. 351 (D.D.C. 1985), *aff'd mem.* 790 F.2d 163 (D.C. Cir. 1986); *cf. Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, 629 F.2d 786, 791 (2d Cir. 1980) (FSIA does not apply retroactively to case filed before effective date of statute); *but see Yessenin-Volpin v. Novosti Press Agency*, 443 F.Supp. 849, 851 n. 1 (S.D.N.Y. 1978) (Act, which merely codified restrictive theory of sovereign immunity adopted in 1952 Tate Letter applies retroactively to action of foreign government taken in 1976). The cases followed the general rule that "retrospective operation will not be given to a statute which interferes with antecedent rights or by which human action is regulated, unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.'" *Union Pacific R. Co. v. Laramie Stock Yards*, 231 U.S. 190, 199, 34 S.Ct. 101, 102, 58 L.Ed. 179 (1913) (citation omitted). And they have held inapplicable the exception for purely remedial measures, because applying the FSIA "to pre-1952 transactions and events would affect foreign sovereigns' antecedent rights adversely." *Carl Marks & Co., Inc. v. Union of Soviet Socialist Republics*, 665 F.Supp. 323, 339 (S.D.N.Y. 1987), *aff'd* 841 F.2d 26 (2d Cir. 1988). *Accord Jackson v. People's Republic of China*, 596 F.Supp. 386, 389 (N.D. Ala. 1984), *aff'd* 794 F.2d 1490 (11th Cir. 1986); *Slade*, 617 F.Supp. at 358.

There is a strong argument in favor of applying the FSIA retroactively, however. In declaring the purpose of the FSIA, the Congress directed that "[c]laims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter." 28 U.S.C. § 1602. This suggests that the FSIA is to be applied to all cases decided after its enactment, i.e. regardless of when the plaintiff's cause of action may have accrued. *But see Jackson*, 596 F.Supp. at 388. Moreover, when it enacted the FSIA, the Congress deleted from 28 U.S.C. § 1332 the provision for diversity jurisdiction over suits brought by a United States citizen against a foreign government. According to the House Report on the FSIA, "since jurisdiction in actions against foreign states is comprehensively treated by the new section 1330, a similar jurisdictional basis under section 1332 becomes superfluous." H.R.Rep. No. 94-1487, 94th Cong. 2d Sess., 14 (1976). Unless one is to infer that the Congress intentionally but silently denied a federal forum for all suits against a foreign sovereign arising under federal law that were filed after enactment of the FSIA but based upon pre-FSIA facts, the implication is strong that all questions of foreign sovereign immunity, including those that involve an act of a foreign government taken before 1976, are to be decided under the FSIA. *See Yessenin-Volpin*, 443 F.Supp. at 851 n. 1.

Indeed, under the teaching of a recent Supreme Court case, application of the FSIA to the pre-1952 events here in suit may not even count as "a genuinely 'retroactive' effect". *Landgraf v. USI Film Products*, ____ U.S. ____, ____, 114 S.Ct. 1483, 1503, 128 L.Ed.2d 229 (1994). Only a statute that "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed" is truly retroactive. *Id.* ____ U.S. at ____, 114 S.Ct. at 1505. A statute affecting jurisdiction, on the other hand, "usually 'take[s] away no substantive right but simply changes the tribunal that is to hear the case.' *Hallowell*, 239 U.S., 508, 36 S.Ct. at 202, [60 L.Ed. 409.] Present law normally governs in such situations because jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties,' *Republic Nat. Bank of Miami*, [v.

U.S.] 506 U.S. at [____, ____], 113 S.Ct. [554] at 565 [121 L.Ed.2d 474] (Thomas, J., concurring)." *Id.* ____ U.S. at ____, 114 S.Ct. at 1502. At least when one of the several states is a defendant, an expectation of immunity from suit is not such a "right." *See United States v. Alabama*, 362 U.S. 602, 604, 80 S.Ct. 924, 926, 4 L.Ed.2d 982 (1960) (upholding district court jurisdiction over suit against state pursuant to Civil Rights Act amendment enacted after suit filed); *but see Jackson*, 794 F.2d at 1497; *Carl Marks*, 841 F.2d at 27 (before Tate Letter, foreign sovereigns had settled expectation of immunity amounting to antecedent right). Similarly, it might be argued, application of the FSIA (and particularly application of an exception set out in the FSIA) to the events at issue in this case would not alter Germany's liability under the applicable substantive law in force at the time, i.e. it would just remove the bar of sovereign immunity to the plaintiff's vindicating his rights under that law. *See Landgraf*, ____ U.S. at ____, 114 S.Ct. at 1502 ("Because rules of procedure regulate secondary rather than primary conduct, the fact that a new procedural rule was instituted after the conduct giving rise to the suit does not make application of the rule at trial retroactive").

We do not have to decide whether the FSIA applies to pre-1952 events, however, in order to resolve this case. For as will be seen in Part II.B below, even if the FSIA does apply here, none of the statutory exceptions to foreign sovereign immunity applies. On the other hand, if the FSIA does not apply to Mr. Princz's claims, and even if Germany is not immune from suit under the pre-FSIA law that would apply, then as will be seen in Part II.C, a federal district court does not have jurisdiction over Mr. Princz's claims because they arise in tort and quasi contract. Mr. Princz offers no case law, and we are aware of none, suggesting that a court can revive the pre-FSIA diversity jurisdiction of § 1332 over cases brought by a United States citizen against a foreign state in order to entertain a case arising from pre-FSIA facts. In either event, therefore, the district court is without subject matter jurisdiction of the present case.

B. *The Foreign Sovereign Immunities Act of 1976*

Under the FSIA a foreign sovereign is immune from the jurisdiction of "the courts of the United States and of the States," except insofar as a particular case comes within one of the several statutory exceptions to the rule of immunity, 28 U.S.C. § 1605, or is governed by an international agreement to which the United States was a party when the FSIA was enacted. *Id.* § 1604. Mr. Princz invokes both the international agreement provision and two of the listed exceptions, viz. the exception for instances "in which the foreign state has waived its immunity either explicitly or by implication," *id.* § 1605(a)(1), and the exception for cases in which the claim arises from the foreign state's "commercial activity," as defined in the Act. *Id.* § 1605(a)(2). It is the burden of the foreign sovereign in each case to establish its immunity by demonstrating that none of the exceptions is applicable. *Transamerican S.S. Corp. v. Somali Democratic Republic*, 767 F.2d 998, 1002 (D.C.Cir. 1985).

1. The commercial activity exception.

Section 1605(a)(2) of the FSIA provides that a foreign sovereign and its agencies and instrumentalities:

> shall not be immune from the jurisdiction of the courts of the United States or of the States in any case ... in which the action is based ... upon an act outside the territory of the United States in connection with a *commercial activity of the foreign sovereign elsewhere* and that act causes *a direct effect in the United States.*

[Emphases added.] Mr. Princz argues that the Nazi government's leasing his labor for profit to the I.G. Farben and Messerschmidt companies was commercial activity, and that it had a direct effect in the United States. Germany takes issue with both points.

a. Commercial activity.

"Commercial activity" is defined in the FSIA as "either a regular course of commercial conduct or a particular commercial transaction or act." 28 U.S.C. § 1603(d). The courts are instructed only that "[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." *Id.* Otherwise, the FSIA leaves to the courts the "work[ing] out ... the distinction between commercial and governmental" activity. *Millen Industries, Inc. v. Coordination Council for North American Affairs*, 855 F.2d 879, 884 n. 6 (D.C. Cir. 1988), quoting *Hearings on H.R. 11315 Before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary*, 94th Cong., 2d Sess. 53 (1976) (testimony of Monroe Leigh, Legal Advisor, Department of State).

As glossed by the Supreme Court, this means that in determining whether an activity is commercial, "the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in 'trade and traffic or commerce.'" *Republic of Argentina v. Weltover, Inc.*, ____ U.S. ____, ____, 112 S.Ct. 2160, 2166, 119 L.Ed.2d 394 (1992) (citation omitted); *Millen Industries*, 855 F.2d at 884 ("A useful inquiry ... is whether the essence or central elements of an agreement made by a foreign state 'might be made by a private person,'" quoting H.R.Rep. No. 1487, 94th Cong., 2d Sess. 16 (1976)).

For its part, the government of Germany points out "that private parties do not take or hold prisoners." Mr.

Princz counters that the Nazi regime "leased slaves for money to German industrial concerns who in turn utilized the slaves in commercial interests." Each of these statements is, of course, true and the question is therefore a close one, viz. whether to pierce the sovereign veil, lest the purpose of the statute be frustrated by the machinations of a rogue government that in effect leases its immunity to a private party.

As it turns out, however, we need not decide whether leasing prisoners as slave labor constitutes a commercial activity under the FSIA. For certain it is that this activity did not have a "direct effect in the United States."

b. Direct effect in the United States.

To be "direct" within the meaning of the FSIA an effect need not be "substantial" or "foreseeable" so long as it is more than "purely trivial" and "it follows 'as an immediate consequence of the defendant's ... activity.'" *Weltover*, ____ U.S. at ____, 112 S.Ct. at 2168 (citation omitted). Germany here argues that the Nazis' enslavement of Mr. Princz in Poland and Germany "had no impact, much less an immediate consequence, in the United States." Mr. Princz, per contra, instances three such effects.

First, Mr. Princz argues that the work he was required to perform as a slave had a direct effect in this country because he worked for firms directly supporting the Nazi war effort against the United States. A "direct effect" however, "is one which has no intervening element, but, rather, flows in a straight line without deviation or interruption." *Upton v. Empire of Iran*, 459 F.Supp. 264, 266 (D.D.C. 1978), *aff'd mem.* 607 F.2d 494 (D.C.Cir. 1979). Many events and actors necessarily intervened between any work that Mr. Princz performed—as a bricklayer for I.G. Farben in Poland or as a laborer in the Messerschmidt aircraft works in Germany—and any effect felt in the United States.

Mr. Princz's second argument is that the current government of Germany uses the mail, wire, and banking systems of the United States to administer pension and other reparation programs for the victims of the Third Reich, thereby providing the requisite "direct effect in the United States." Germany denies that it administers these programs in or from the United States. Even if it does, however, such activities, conducted years after the alleged "commercial activity" giving rise to this suit, can not be considered an "immediate consequence" of the enslavement of Mr. Princz and others. Again, there are too many intervening elements between the asserted cause and effect.

Finally, Mr. Princz argues that his continued suffering in the United States is a direct effect of his forced labor under the Nazi yoke. After Mr. Princz was liberated by the United States Army he spent time recuperating in a military hospital. From there he went to Czechoslovakia to search for relatives and to attend to his family's property, only after which did he move to the United States. Mr. Princz's subsequent suffering was clearly an effect, but just as clearly not "a direct effect in the United States" of the Nazis' actions. Mr. Princz was enslaved in Poland and Germany; the immediate consequences of his enslavement were felt in those countries, and much time passed before Mr. Princz came to this country. *See Martin v. Republic of South Africa*, 836 F.2d 91, 95 (2d Cir. 1987) (no "direct effect" where South African government allegedly caused permanent disability to American citizen who did not return to the United States until more than a year later).

The lingering effects of a personal injury suffered overseas can not be sufficient to satisfy the direct effect requirement of the FSIA. Otherwise, "the commercial activity exception would in large part eviscerate the FSIA's provision of immunity for foreign states." *Antares Aircraft L.P. v. Federal Republic of Nigeria*, 999 F.2d 33, 36 (2d Cir. 1993). Absent a clear indication to that effect, a court will not attribute to the Congress the intention through an exception to undermine the general grant of sovereign immunity it was ostensibly ratifying. Thus, courts applying the FSIA have uniformly rejected the argument that a personal injury suffered overseas produces a direct effect in the United States when the injured person later returns home. *Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511, 1514 (D.C. Cir. 1988) (financial and marital difficulty suffered in United States as result of Saudi Arabian government's failure to pay American employee for work performed in Saudi Arabia not a "direct effect in the United States"); *Martin v. Republic of South Africa*, 836 F.2d 91, 95 (2d Cir. 1987); *Zernicek v. Brown & Root, Inc.*, 826 F.2d 415, 418-19 (5th Cir. 1987); *Australian Gov't Aircraft Factories v. Lynne*, 743 F.2d 672, 675 (9th Cir. 1984); *Tucker v. Whitaker Travel, Ltd.*, 620 F.Supp. 578 (E.D.Pa. 1985), *aff'd mem.*, 800 F.2d 1140 (3d Cir. 1986).

We therefore hold that even if the Nazis' leasing of Mr. Princz's labor was a "commercial activity" within the meaning of the FSIA, that activity did not have a "direct effect" in the United States.

2. The waiver exception of § 1605(a)(1).

Not surprisingly, there is no sovereign immunity in a case "in which the foreign state has waived its immunity either explicitly or by implication," 28 U.S.C. § 1605(a)(1) (with an exception not here relevant). Here the *amici* argue that the Third Reich impliedly waived Germany's sovereign immunity under the FSIA by violating *jus cogens* norms of the law of nations. In their own words: "A foreign state that violates these fundamental requirements of a civilized world thereby waives its right to be treated as a sovereign." With respect, we do not think that the waiver exception to the FSIA can be read so broadly.

A *jus cogens* norm is a principle of international law that is "accepted by the international community of States as a whole as a norm from which no derogation is permitted...." *Committee of U.S. Citizens in Nicaragua v. Reagan*, 859 F.2d 929, 940 (D.C.Cir. 1988), quoting Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, U.N.Doc. A/Conf. 39/27, 8 I.L.M. 679. Such peremptory norms are "nonderogable and enjoy the highest status within international law," *Committee of U.S. Citizens in Nicaragua*, 859 F.2d at 940; they "prevail over and invalidate international agreements and other rules of international law in conflict with them," and they are "subject to modification only by a subsequent norm of international law having the same character." Restatement, *supra*, § 102 comment k.

According to one authority, a state violates *jus cogens*, as currently defined, if it:

> practices, encourages, or condones (a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman, or degrading treatment or punishment, (e) prolonged arbitrary detention, (f) systematic racial discrimination, or (g) a consistent pattern of gross violations of internationally recognized human rights.

Restatement, *supra*, § 702 and comment n. Before the Nuremburg trials, such outrages had not been expressly declared violations of the law of nations. David F. Klein, *A Theory for the Application of the Customary International Law of Human Rights by Domestic Courts*, 13 Yale Journal of Int'l Law 332, 340 (1988); Fogelson, *supra* at 869. The Nuremberg Tribunal nonetheless punished Nazi officials for committing crimes against humanity:

> [The trials] for the first time made explicit and unambiguous what was heretofore, as the Tribunal has declared, implicit in International Law, namely, that to prepare, incite, or wage a

> war of aggression ... and that to persecute, oppress, or do violence to individuals or minorities on political, racial, or religious grounds in connection with such a war, or to exterminate, enslave, or deport civilian populations, is an international crime.

R. Jackson, Final Report to the President on the Nuremberg Trials (Oct. 7, 1946) (*cited in* R. Jackson, The Nurnberg Case xiv-xv (1971)); *see also* Klein, *supra* at 340 and nn. 40-42; *The Nurnberg Trial*, 6 F.R.D. 69, 77-78 (1946). As the Ninth Circuit has explained:

> The universal and fundamental rights of human beings identified by Nuremberg—rights against genocide, enslavement, and other inhumane acts ...— are the direct ancestors of the universal and fundamental norms recognized as *jus cogens*.

Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 715 (9th Cir. 1992). Indeed, it is doubtful that any state has ever violated *jus cogens* norms on a scale rivaling that of the Third Reich. *See* Steven Fogelson, *The Nuremberg Legacy: An Unfulfilled Promise*, 63 S.Cal.L.Rev. 833, 834 (1990).

The *amici* argue that interpreting the FSIA to imply a waiver where a violation of *jus cogens* norms has occurred "would reconcile the FSIA with accepted principles of international law." *Citing* Adam Belsky, *Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law*, 77 Cal.L.Rev. 365 (1989). Although no reported decision considers the *amici*'s specific argument that a violation of *jus cogens* norms forfeits immunity under the implied waiver provision of the FSIA, the Ninth Circuit has stated broadly that "[t]he fact that there has been a violation of *jus cogens* does not confer jurisdiction under the FSIA." *Siderman de Blake*, 965 F.2d at 719.

Moreover, the *amici's jus cogens* theory of implied waiver is incompatible with the intentionality requirement implicit in § 1605(a)(1). *See Foremost- McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 444 (D.C.Cir. 1990), *quoting Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 377 (7th Cir. 1985) (courts "rarely find that a nation has waived its sovereign immunity ... 'without strong evidence that this is what the foreign state intended'"); *accord Drexel Burnham Lambert v. Committee of Receivers*, 12 F.3d 317, 326 (2d Cir. 1993); *Joseph v. Office of the Consulate General*, 830 F.2d 1018, 1022 (9th Cir. 1987); *Zernicek v. Petroleos Mexicanos (Pemex)*, 614 F.Supp. 407, 411 (S.D.Tex.1985), *aff'd*, 826 F.2d 415 (5th Cir. 1987). That requirement is also reflected in the examples of implied waiver set forth in the legislative history of § 1605(a)(1), all of which arise either from the foreign state's agreement (to arbitration or to a particular choice of law) or from its filing a responsive pleading without raising the defense of sovereign immunity. *See* H.R.Rep. 1487, 94th Cong. 2d Sess., 18 (1976); Sen. Rep. 1310, 94th Cong. 2d Sess., 18 (1976). And as the Seventh Circuit has observed, "[s]ince the FSIA became law, courts have been reluctant to stray beyond these examples when considering claims that a nation has implicitly waived its defense of sovereign immunity." *Frolova*, 761 F.2d at 377.

In sum, an implied waiver depends upon the foreign government's having at some point indicated its amenability to suit. Mr. Princz does not maintain, however, that either the present government of Germany or the predecessor government of the Third Reich actually indicated, even implicitly, a willingness to waive immunity for actions arising out of the Nazi atrocities. We have no warrant, therefore, for holding that the violation of *jus cogens* norms by the Third Reich constitutes an implied waiver of sovereign immunity under the FSIA.[1]

3. The treaty provision.

Section 1604 of the FSIA provides that a foreign sovereign's immunity from suit is "[s]ubject to existing international agreements to which the United States [was] a party at the time of the enactment of [the FSIA]." One such agreement, the Hague Convention, in turn provides that the inhabitants of an occupied country may not be required to "tak[e] part in military operations against their own country," (Article 52) and that "[a] belligerent party which violates [this prohibition] shall, if the case demands, be liable to pay compensation." (Article 3).

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[1] Our dissenting colleague Judge Wald suggests, in effect, that because the Congress has not expressly excluded suits for the violation of *jus cogens* norms from the scope of § 1605(a)(1), international law requires that we "construe the [FSIA] to encompass an implied waiver exception" for such suits, thus providing jurisdiction over Mr. Princz's claims. Dis. Op. at 1184-85. While it is true that "international law is a part of our law," *Paquete Habana*, 175 U.S. at 700, 20 S.Ct. at 299, it is also our law that a federal court is not competent to hear a claim arising under international law absent a statute granting such jurisdiction. Judge Wald finds that grant through a creative, not to say strained, reading of the FSIA against the background of international law itself.

We think that something more nearly express is wanted before we impute to the Congress an intention that the federal courts assume jurisdiction over the countless human rights cases that might well be brought by the victims of all the ruthless military juntas, presidents-for-life, and murderous dictators of the world, from Idi Amin to Mao Zedong. Such an expansive reading of § 1605(a)(1) would likely place an enormous strain not only upon our courts but, more to the immediate point, upon our country's diplomatic relations with any number of foreign nations. In many if not most cases the outlaw regime would no longer even be in power and our Government could have normal relations with the government of the day—unless disrupted by our courts, that is.

Like Judge Wald, we recognize that this suit may represent Mr. Princz's last hope of reparation. Still, we cannot responsibly make the inferential leap that would be required in order to provide him with the federal forum he seeks.

In the Nuremberg Trial decision the Tribunal makes official what is in any event clear, that the Nazi regime acted "in flagrant violation of the terms" of the Hague Convention, including Article 52. 6 F.R.D. 69, 123 (1946). Therefore, Mr. Princz argues, "the compensation provisions of the Hague Convention are in conflict with the FSIA's immunity provision, thus invoking its exception for prior existing treaty obligations." Binding precedent is clearly to the contrary, and clearly correct.

In *Amerada Hess*, the Supreme Court held that the treaty exception of the FSIA "applies when international agreements 'expressly conflic[t]' with the immunity provisions of the FSIA," and that an international convention that "only set[s] forth substantive rules of conduct and state[s] that compensation shall be paid for certain wrongs.... [d]o[es] not [necessarily] create private rights of action...." 488 U.S. at 442, 109 S.Ct. at 692. The cases are unanimous, however, in holding that nothing in the Hague Convention "even impliedly grants individuals the right to seek damages for violation of [its] provisions." *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 810 (D.C.Cir. 1984) (Bork, J., concurring); *accord Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 968-69 (4th Cir. 1992); *Dreyfus v. Von Finck*, 534 F.2d 24, 30 (2d Cir. 1976); *Handel v. Artukovic*, 601 F.Supp. 1421, 1425 (C.D. Cal. 1985).

For the foregoing reasons, we conclude that none of the exceptions to sovereign immunity provided in the FSIA applies to the facts alleged by Mr. Princz. Therefore, we need not decide whether the FSIA applies retroactively to this case; for Mr. Princz' suit is barred by the FSIA even if we do give retroactive effect to that Act—and more to the point, to the exceptions to sovereign immunity that it recognizes.

C. *Foreign Sovereign Immunity Under the Circuit Law of 1942-45*

What, then, if the FSIA does not apply retroactively to bar this case? In that event, Germany argues (albeit for the first time on appeal) that it is entitled to absolute sovereign immunity under the case law of this circuit as it stood during the period 1942-45, i.e. prior to the Tate Letter and to adoption of the restrictive theory of sovereign immunity. To this end Germany cites *United States ex rel. Cardashian v. Snyder*, 44 F.2d 895 (D.C. Cir. 1930) and *Matthews, United States Marshal v. Walton Rice Mill, Inc.*, 176 F.2d 69 (D.C. Cir. 1949).

Because subject matter jurisdiction cannot be created by consent, waiver, or even estoppel, *Insurance Corp. v. Compagnie des Bauxites de Guinea*, 456 U.S. 694, 702, 102 S.Ct. 2099, 2104, 72 L.Ed.2d 492 (1982), we would consider this belated argument if it were of any consequence to federal jurisdiction of this case. It is immaterial, however, because there is no present basis for subject matter jurisdiction over Mr. Princz's claims in the district court regardless of the state of the circuit law concerning immunity in the period 1942-1945.

Until the passage of the FSIA in 1976, 28 U.S.C. § 1332 provided for federal diversity jurisdiction over a case brought by a United States citizen against a foreign state. When the Congress passed the FSIA, however, it deleted that grant of jurisdiction from § 1332. As noted above, the House Report on the FSIA states that "[s]ince jurisdiction in actions against foreign states is comprehensively treated by the new section 1330, a similar jurisdictional basis under section 1332 becomes superfluous." H.R.Rep. No. 94- 1487, 94th Cong. 2d Sess., 14 (1976). New § 1330(a), in turn, asserts federal jurisdiction over a suit against a foreign state only insofar as the foreign state is not entitled to immunity under the FSIA; and as we have already held, no exception to immunity under the FSIA covers this case.

Nor is this case within the federal question jurisdiction conferred by 28 U.S.C. § 1331, because Mr. Princz's claims against Germany sound in tort and quasi contract, not in federal law. Regardless whether Germany is entitled to sovereign immunity apart from the FSIA, therefore, the district court lacks subject matter jurisdiction over Mr. Princz's claims.

III. CONCLUSION

The district court lacks jurisdiction of Mr. Princz's claims. If the FSIA applies retroactively to the terrible events giving rise to this case, then it bars the suit, which comes within no exception in the Act. If instead the case is governed by the pre-FSIA law of sovereign immunity, then it is not within post-FSIA diversity jurisdiction of the district court. The judgment of the district court is therefore reversed and the case is

Dismissed.

WALD, Circuit Judge, dissenting:

The Holocaust indelibly scarred Hugo Princz. At the outbreak of World War II, Princz, a sixteen-year-old American Jew, found himself trapped in Czechoslovakia and unable to return to the United States. After America formally declared war against Germany, the Nazis seized Princz, his parents, his three brothers, and his sister as enemy aliens. The Nazis refused to exchange the family for German civilians detained by the United States as part of an International Red Cross program, instead forcibly transporting them to the

Maidanek concentration camp in Poland, where Princz and two of his brothers were torn from their parents and sister. Princz believes that German officials murdered his parents and sister at the concentration camp in Treblinka; he never saw them again.[1]

In May 1942, the Nazis transported Princz and his two brothers to the concentration camp at Auschwitz. There, they stripped Princz of his personal identity—tattooing him with the number "36 707" and requiring him to wear a prisoner's uniform with "USA" stenciled on the front. The Nazis then "leased" Princz and his brothers to I.G. Farben, a German chemical cartel, which enslaved the three brothers at a facility known as Birkenau. During his two years of forced labor at Birkenau and captivity at Auschwitz, Princz was the victim of unrelenting physical, mental, and emotional abuse. After each of his brothers suffered work-related injuries, Princz was subjected to the unimaginable horror of watching officials intentionally starve them to death at the Birkenau "hospital."

Bereft of family, Princz was sent to the Warsaw Ghetto for eight months. Princz's description of the time spent in the ghetto as a "relative respite" gives some indication of the atrocities witnessed by and inflicted upon him during his prior (and subsequent) enslavement and imprisonment. But the monstrosities did not end within Warsaw's walls. In October 1944, Princz was again transferred to the immediate custody of the Nazis and forced on a death march to Dachau, where he was enslaved as a laborer in the underground Messerschmidt airplane factory. Six months later, when it became clear the

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[1] At this stage, we may not question Princz's rendition of the horrors he suffered. In reviewing a motion to dismiss based in part on Federal Rule of Civil Procedure 12(b)(6), we must accept all of the plaintiff's allegations in the complaint as true. *See Moore v. Agency for Int'l Dev't*, 994 F.2d 874, 875 (D.C. Cir. 1993).

Allies would win the war, the Nazis sought to eliminate all evidence of the Holocaust, including the existence of slave laborers. Forced onto a cramped cattle train headed toward a mass execution in the Alps, Princz survived only because of the intervening German surrender. After searching futilely for traces of his family, Princz eventually returned to the United States.

For decades thereafter, using the available international compensation mechanisms, Princz sought unsuccessfully to obtain reparations from Germany for both the loss of his pension and the physical and mental suffering inflicted upon him during the war. Despite its public professions of penitence for the horrors of the Holocaust, however, Germany repeatedly relied on technicalities such as Princz's citizenship at the time of his enslavement to deny him either a pension or any restitution for his immense suffering. Ironically, had Princz not been an American citizen at the time of the Holocaust, he would have received compensation.

Finally, in March 1992, Princz filed suit in a United States federal district court, basing his claims against Germany on theories of false imprisonment, assault and battery, negligent infliction of emotional distress, and intentional infliction of emotional distress. Princz sought compensatory and punitive damages, as well as the value in quantum meruit of his labor at the I.G. Farben and Messerschmidt plants. The district court denied Germany's motion to dismiss for lack of subject-matter jurisdiction under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602 *et seq.* ("FSIA" or "Act"), ruling that the FSIA "has no role to play where the claims alleged involve undisputed acts of barbarism committed by a one-time outlaw nation which demonstrated callous disrespect for the humanity of an American citizen, simply because he was Jewish." *Princz v. Federal Republic of Germany*, 813 F.Supp. 22, 26 (D.D.C. 1992).

After we determined that the district court's jurisdictional decision was immediately appealable, *see Princz v. Federal Republic of Germany*, 998 F.2d 1 (D.C. Cir. 1993), Princz renewed his pursuit of a diplomatic remedy, and the political branches of the United States government voiced substantial support for his plight. In mid-November 1993, the United States Senate unanimously expressed its hope that President Clinton would raise the matter of reparations for Princz during his January 31, 1994 meeting with German Chancellor Helmut Kohl and "state publicly and unequivocally that the United States will not countenance the continued discriminatory treatment of Hugo Princz in light of the terrible torment he suffered at the hands of the Nazis." S. Res. 162, 103d Cong., 1st Sess. at 4 (1993). The House of Representatives overwhelmingly passed a similar resolution in late January 1994. *See* H. Res. 323, 103d Cong., 2d Sess. (1994). Nonetheless, diplomatic channels proved unavailing. When President Clinton raised the issue during the January 31, 1994 meeting, Chancellor Kohl reportedly refused to engage in any discussion of Princz while his case was pending before this court. Moreover, in a diplomatic note to the Department of State, the German government was quick to emphasize that the Chancellor's silence "is not meant to imply that out of court negotiations are contemplated at a later date." Note Verbale from the Embassy of the Federal Republic of Germany to the United States Department of State 4 (Feb. 2, 1994).

Due to Germany's unequivocal refusal to enter into any settlement with Princz, this appeal is his last resort. Contrary to my colleagues, who would deny Princz the opportunity even to present his claims in federal court, I would affirm the district court's order denying Germany's motion to dismiss on grounds of foreign sovereign immunity. I believe that Germany's treatment of Princz violated *jus cogens* norms of the law of nations, and that by engaging in such conduct, Germany implicitly waived its immunity from suit within the meaning of s 1605(a)(1) of the FSIA. Accordingly, in my view, the federal courts have jurisdiction to entertain Princz's claims.

I. THE FSIA APPLIES

The FSIA, enacted in 1976, is the sole means of obtaining jurisdiction over a foreign state defendant in federal court. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434, 109 S.Ct. 683, 688, 102 L.Ed.2d 818 (1989). The first inquiry, therefore, is whether the FSIA applies to Princz's claims, which arose over thirty years before its enactment. While my colleagues articulate several persuasive reasons for applying the FSIA to this case, they do not decide whether it covers the heinous acts alleged here. I think that it does.

The Supreme Court has recently provided the following analytical framework for retroactivity analysis:

> [w]hen a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.

Landgraf v. USI Film Prods., ____ U.S. ____, ____, 114 S.Ct. 1483, 1505, 128 L.Ed.2d 229 (1994).

The language and legislative history of the FSIA provide only ambiguous guidance on the retroactivity question. The "henceforth" language of § 1602[2] suggests that courts addressing claims filed after the effective date of the FSIA should apply the Act regardless of whether the underlying challenged conduct occurred before or after its enactment. *See* Majority Opinion ("Maj. Op.") at 7. Nonetheless, several courts have held that the "statutory language and legislative history of the FSIA provide no support for the retroactive application of the Act to transactions occurring before 1952," the year when the United States adopted the principle of restrictive immunity for commercial transactions. *Slade v. United States of Mexico*, 617 F.Supp. 351, 357 (D.D.C. 1985), *aff'd mem. op.* 790 F.2d 163 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1032, 107 S.Ct. 878, 93 L.Ed.2d 832 (1987); *accord Jackson v. People's Republic of China*, 596 F.Supp. 386, 388 (N.D. Ala. 1984), *aff'd* 794 F.2d 1490, 1497 (11th Cir. 1986), *cert. denied*, 480 U.S. 917 (1987); *Carl Marks & Co. v. U.S.S.R.*, 665 F.Supp. 323, 336-37 (S.D.N.Y. 1987), *aff'd* 841 F.2d 26 (2d Cir.), *cert. denied*, 487 U.S. 1219, 108 S.Ct. 2874, 101 L.Ed.2d 909 (1988). As evidence of the Act's prospective reach, these courts have focused on both the "henceforth" language of § 1602 and Congress' decision to delay the effective date of the FSIA for ninety days. *See Slade*, 617 F.Supp. at 357; *accord Jackson*, 596 F.Supp. at 388; *Carl Marks & Co.*, 665 F.Supp. at 336-37 (provision in § 1330(a) that district courts "shall have" jurisdiction over cases specified in §§ 1605 & 1607 indicates prospective application).

In the absence of any express congressional intent on the retroactivity issue, the next question is whether applying the FSIA would "impair rights a party possessed when he acted," *Landgraf*, ___ U.S. at ____, 114 S.Ct. at 1505, *i.e.*, whether in 1942-45 Germany would have been entitled to immunity for imprisoning and enslaving Princz. Germany argues that in the 1940s our courts would not have allowed a sovereign to be sued absent its consent. The Supreme Court, however, has emphasized a different practice: deference by the courts to the case-by-case foreign policy determinations of the executive branch. *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486, 103 S.Ct. 1962, 1967-68, 76 L.Ed.2d 81 (1983); *see, e.g., Ex Parte Peru*, 318 U.S. 578, 587-89, 63 S.Ct. 793, 799-800, 87 L.Ed. 104 (1943) (ordering district court to relinquish in rem jurisdiction over Peruvian-owned vessel where Department of State recognized and allowed immunity of Peru); *Mexico v. Hoffman*, 324 U.S. 30, 36, 65 S.Ct. 530, 533, 89 L.Ed. 729 (1945) (exercising *in rem* jurisdiction in absence of State Department certification of immunity or evidence that the United States would customarily recognize immunity); *see also* Edward D. Re, *Human Rights, Domestic Courts, and Effective Remedies*, 67 ST. JOHN'S L. REV. 581, 583 (1993) (before 1952 executive branch would decide whether to espouse claims of injured citizens). As Chief Justice Stone remarked, "[i]t is ... not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize." *Hoffman*, 324 U.S. at 35, 65 S.Ct. at 533. The operative question, then, is whether the executive branch would have recommended immunity for perpetrators of the Holocaust. The intuitive answer is no.

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[2] Section 1602 provides that "[c]laims of foreign states to immunity should *henceforth* be decided by courts of the United States and the States in conformity with the principles set forth in this chapter." 28 U.S.C. § 1602 (1988) (emphasis added).

In the mid-1940s, Germany could not, even in its wildest dreams, have expected the executive branch of the United States, as a matter of grace and comity, to suggest immunity for its enslavement and confinement (in three concentration camps) of an American citizen during the

Holocaust. The outcome of the Nuremberg trials provides a clear signal that the international community, and particularly the United States—one of the four nations that established the Nuremberg Tribunal—would not have supported a broad enough immunity to shroud the atrocities committed during the Holocaust. Indeed, the Nuremberg Tribunal denied the German defendants' claims of official immunity because in the eyes of the international community Germany as a whole was owed no immunity: "[h]e who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorizing action moves outside its competence under International Law." *The Nuremberg Decision*, 6 F.R.D. 69, 110 (1946). Clearly, had the question been put to them, the United States executive branch would have opted to deny Germany's claims to immunity for the crimes alleged in this case. *Cf. Bernstein v. N.V. Nederlandsche-Amerikaansche*, 210 F.2d 375, 376 (2d Cir. 1954) (allowing district court to pass on validity of acts of officials of German government due to State Department letter "reliev[ing] American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials"). Accordingly, because the FSIA infringes upon no rights held by Germany at the time it enslaved and imprisoned Princz, it applies to this case. *See Bradley v. Richmond School Bd.*, 416 U.S. 696, 711, 94 S.Ct. 2006, 2016, 41 L.Ed.2d 476 (1974) ("a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice"). Germany would suffer no inequity from this result, but a contrary conclusion would indeed be manifestly unjust to Princz.

II. IMPLIED WAIVER EXCEPTION TO FOREIGN SOVEREIGN IMMUNITY

The FSIA sets forth a general rule of foreign sovereign immunity followed by several exceptions. Jurisdiction lies whenever a litigant's claims fall within one of the statutory exceptions. One of these exceptions to immunity, the implied waiver exception, provides that a foreign state shall not be immune in any case in which the state "has waived its immunity either explicitly or by implication." 28 U.S.C. § 1605(a)(1) (1988). Because I believe that Germany implicitly waived its immunity by engaging in the barbaric conduct alleged in this case, I disagree with my colleagues' conclusion that none of the FSIA exceptions to foreign sovereign immunity apply.

Germany waived its sovereign immunity by violating the *jus cogens* norms of international law condemning enslavement and genocide. A *jus cogens* norm, also known as a "peremptory norm" of international law, "is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 1155 U.N.T.S. 332; *see also* 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102, cmt. k & Reporter's Note 6 (1987) [hereinafter RESTATEMENT (THIRD)] (adopting Vienna Convention's definition of *jus cogens*). *Jus cogens* norms are a select and narrow subset of the norms recognized as customary international law. *See Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 940 (D.C. Cir. 1988) [hereinafter *CUSCLIN*]. Sitting atop the hierarchy of international law, *jus cogens* norms enjoy the greatest clout, preempting both conflicting treaties and customary international law. *See* RESTATEMENT (THIRD) § 102, cmt. k (international agreements which violate *jus cogens* norms are void); *see also United States v. Alfried Krupp*, IX TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG [SIC] MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 at 1395 (1950) (finding agreement between Germany and France authorizing use of French prisoners of war in German armament industry void under law of nations).

One need not pause long before concluding that the international community's denunciation of both genocide and slavery are accepted norms of customary international law and, in particular, are *jus cogens* norms. The Restatement (Third) of Foreign Relations Law defines customary international law as the "general and consistent practice of states followed by them from a sense of legal obligation." 1 RESTATEMENT (THIRD) § 102(2). To ascertain customary international law, judges resort to "the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators." *The Paquete Habana*, 175 U.S. 677, 700, 20 S.Ct. 290, 299, 44 L.Ed. 320 (1900). These same tools are used to determine whether a norm of customary international law has attained the special status of a *jus cogens* norm. *See Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 715 (9th Cir. 1992), *cert. denied*, ____ U.S. ____, 113 S.Ct. 1812, 123 L.Ed.2d 444 (1993). A *jus cogens* norm exists if the international community recognizes the norm as so fundamental that it is "nonderogable." *See CUSCLIN*, 859 F.2d at 940. While commentators may disagree on the exact scope of all *jus cogens* norms, there is universal consensus on the existence of norms against genocide and enslavement. *See, e.g., Siderman*, 965 F.2d at 715 (deeming rights against genocide and enslavement universal and fundamental); *CUSCLIN*, 859 F.2d at 942 (noting "universal disapprobation" aroused by slavery or genocide); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781, 791 n. 20 (D.C. Cir. 1984) (Edwards, J., concurring) (describing genocide and slavery as "heinous actions—each of which violates definable, universal and obligatory norms"), *cert. denied*, 470 U.S. 1003, 105 S.Ct. 1354, 84 L.Ed.2d 377 (1985); Convention to Suppress the Slave Trade and Slavery, Sept. 25, 1926, 46 Stat. 2183, T.S. No. 778, 60 L.N.T.S. 253 (ratified by United States); Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 7, 1948, 78 U.N.T.S. 277 (ratified by United States); *see also* 2 RESTATEMENT (THIRD) § 702(a) & (b), cmt. n (classifying norms against genocide and slavery as *jus cogens* norms); Advisory Opinion, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15, 23 (May 28) ("the principles underlying the [Genocide] Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation"); Adam C. Belsky et al., *Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law*, 77 CAL. L. REV. 365, 389 (1989) [hereinafter *Implied Waiver*] (concluding that prohibition of slavery and genocide falls within category of *jus cogens* norms necessary to protect minimum standards of public order). What could be more fundamental than an individual's right to be free from the infliction of cruel and sadistic terrors designed with the sole purpose of destroying the individual's psyche and person because of the national, ethnic, racial, or religious community to which he belongs? What could be more elementary than a prohibition against eviscerating a person's human dignity by thrusting him into the shackles of slavery? Germany clearly violated *jus cogens* norms by forcibly extracting labor from Princz at the I.G. Farben and Messerschmidt factories and by subjecting him to unconscionable physical and mental abuse at the Auschwitz and Dachau concentration camps.

The international consensus endorsing the existence and force of *jus cogens* norms solidified in the aftermath of World War II. "The universal and fundamental rights of human beings identified by Nuremberg—rights against genocide, enslavement, and other inhumane acts—are the direct ancestors of the universal and fundamental norms recognized as *jus cogens*." *Siderman*, 965 F.2d at 715 (citations omitted). After the Nuremberg war crimes trials, the General Assembly of the United Nations unanimously approved a resolution affirming "the principles of international law recognized by the Charter of the Nurnberg [sic] Tribunal and the judgment of the Tribunal." *Affirmation of the Principles of International Law Recognized in the Charter of the Nuremberg Tribunal*, G.A. Res. 95(I), U.N. GAOR, 1st Sess., at 188, U.N. Doc. A/236 (1947). One of the United States prosecutors at the Nuremberg trials described these principles, known as the "Nuremberg Principles," as "an international legal force to be reckoned with." Telford Taylor, THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR 4 (1992). The Nuremberg Principles crystallized the pre-existing international condemnation of persecution and enslavement of civilians on the basis of race or religious belief, with the widescale atrocities committed by Hitler's Germany driving home the concept that certain fundamental rights may never be transgressed under international law. *See* Steven Fogelson, *The Nuremberg Legacy: An Unfulfilled Promise*, 63 S.CAL. L. REV. 833, 868 (1990); *see also Siderman*, 965 F.2d at 715 ("The legitimacy of the Nuremberg prosecutions rested not on the consent of the Axis Powers and individual defendants, but on the nature of the acts they committed: acts that the laws of all civilized nations define as criminal.").

The principle of nonderogable peremptory norms evolved due to the perception that conformance to certain fundamental principles by all states is absolutely essential to the survival of the international community. *See* Belsky, *Implied Waiver*, 77 CAL. L. REV. at 387. Were the conscience of the international community to permit derogation from these norms, ordered society as we know it would cease.

Thus, to preserve the international order, states must abdicate any "right" to ignore or violate such norms. As the German Supreme Constitutional Court has explained, *jus cogens* norms are those that "are indispensable to the existence of the law of nations as an international legal order, and the observance of which can be required by all members of the international community." Comment, *Jus Dispositivum and Jus Cogens in International Law: In the Light of a Recent Decision of the German Supreme Constitutional Court*, 60 AM. J.INT'L L. 511, 513 (1966) (emphasis added). Unlike general rules of customary international law (*jus dispositivum*), *jus cogens* norms are binding upon all nations; where as states are not constricted by customary international law norms to which they continuously object, *jus cogens* norms do not depend on the consent of any individual state for their validity. *See* David F. Klein, *A Theory for the Application of the Customary International Law of Human Rights by Domestic Courts*, 13 YALE J. INT'L L. 332, 351 (1988) [hereinafter *Customary International Law*]. Therefore, *jus cogens* norms have significant implications for the law of sovereign immunity, which hinges on the notion that a state's consent to suit is a necessary prerequisite to another state's exercise of jurisdiction.

To illuminate the intersection between *jus cogens* norms and the theory of foreign sovereign immunity, it is useful to begin by examining the evolution of the immunity doctrine. Granting a foreign sovereign immunity from jurisdiction has always been a matter of grace and comity, and is not required by the United States Constitution. *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486, 103 S.Ct. 1962, 1967-68, 76 L.Ed.2d 81 (1983). The Supreme Court first broached the question of foreign sovereign immunity in 1812, when it stated that states enjoy "exclusive and absolute" jurisdiction over their own territory. *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116, 136 (1812). While

Justice Marshall's seminal opinion is most often cited for the proposition that foreign sovereigns enjoy virtually absolute immunity from suit in United States courts, *see, e.g.*, *Verlinden*, 461 U.S. at 486, 103 S.Ct. at 1967-68, the decision in fact focused on the exceptions to exclusive territorial jurisdiction, which stem from a state's explicit or implicit consent to be intruded upon. *See The Schooner Exchange*, 11 U.S. (7 Cranch) at 136-42, 3 L.Ed. 287. Such consent derives from the interest in interstate relations, "which humanity dictates and its wants require." *Id.* at 136, 3 L.Ed. 287. Even in the early nineteenth century, therefore, states recognized that, to facilitate international relations, they must on occasion allow infringements on their exclusive territorial jurisdiction.

Prior to the Nuremberg trials, the positivist theory of international law governed state sovereignty, and a state's treatment of its own citizens was considered immune from the dictates of international law. *See* Anthony D'Amato, *What Does Tel-Oren Tell Lawyers? Judge Bork's Concept of the Law of Nations is Seriously Mistaken*, 79 AM. J. INT'L L. 92, 104 (1985); *see also* Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2555 (1991) (Nuremberg trials "represented a radical innovation in international law" because previously international law had not imposed criminal penalties on a state's treatment of its own citizens). At Nuremberg, however, the four victorious powers of World War II tried German officials for "crimes against humanity," which included "murder, extermination, enslavement, deportation, and other inhuman acts committed against any civilian population, before or during the war," even if the victims were German nationals. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Charter of the International Military Tribunal, Aug. 8, 1945, pt. II, art. 6, 59 Stat. 1544, 1547 ("Nuremberg Charter").

The Nuremberg trials thus permanently eroded any notion that the mantle of sovereign immunity could serve to cloak an act that constitutes a "crime against humanity," even if that act is confined within the borders of a single sovereign state.

Because the Nuremberg Charter's definition of "crimes against humanity" includes what are now termed *jus cogens* norms, a state is never entitled to immunity for any act that contravenes a *jus cogens* norm, regardless of where or against whom that act was perpetrated. The rise of *jus cogens* norms limits state sovereignty "in the sense that the 'general will' of the international community of states, and other actors, will take precedence over the individual wills of states to order their relations." Mary Ellen Turpel & Phillipe Sands, *Peremptory International Law and Sovereignty: Some Questions*, 3 CONN. J. INT'L L. 364, 365 (1988). *Jus cogens* norms are by definition nonderogable, and thus when a state thumbs its nose at such a norm, in effect overriding the collective will of the entire international community, the state cannot be performing a sovereign act entitled to immunity. When the Nazis tore off Princz's clothes, exchanged them for a prison uniform and a tattoo, shoved him behind the spiked barbed wire fences of Auschwitz and Dachau, and sold him to the German armament industry as fodder for their wartime labor operation, Germany rescinded any claim under international law to immunity from this court's jurisdiction. *See* Belsky, *Implied Waiver*, 77 CAL. L. REV. at 396.

The exercise of jurisdiction over the Nazi officials at Nuremberg was by no means a single aberration in international law. Under the principle of universal jurisdiction, for certain offenses (including, but not limited to, *jus cogens* violations) a state can exercise jurisdiction over an offender in custody even if that state has neither a territorial link to the offense nor any connection to the nationality of the victim or offender. *See* 1 RESTATEMENT (THIRD) § 404, cmt. a & Reporter's Note 1. While it is rare for a nation to exercise universal jurisdiction, Israel asserted jurisdiction under such a theory, among others, when it abducted Adolf Eichmann, the chief executioner of Hitler's "final solution," from Argentina and prosecuted him in Israel. *See Attorney General of Israel v. Eichmann*, 36 INT'L L. REP. 277 (Sup.Ct. Israel 1962). The most recent example of a prescription of jurisdiction by the international community over *jus cogens* violations carried out within the confines of a state's own territory is the United Nations' Statute of the International War Crimes Tribunal for the former Yugoslavia ("Statute"). Enacted as a response to the appalling atrocities committed against civilians caught in the brutal conflict in the former Yugoslavia, the Statute vests the War Crimes Tribunal with jurisdiction over, *inter alia*, crimes against humanity and genocide committed in the territory of the former Yugoslavia since January 1, 1993. *See Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. SCOR, U.N. Doc. S/25704, art. 1, at 36 (1993). The Statute contains absolutely no indication that foreign sovereign immunity could provide a valid defense to the exercise of the tribunal's jurisdiction. Thus the clear import of international law is to disavow a foreign sovereign's claims to immunity where that sovereign is accused of violating universally accepted norms of conduct essential to the preservation of the international order. In other words, under international law, a state waives its right to sovereign immunity when it transgresses a *jus cogens* norm.

It is a well-established canon of statutory construction that, because "[i]nternational law is part of our law," *Paquete Habana*, 175 U.S. at 700, we must, wherever possible, interpret United States law consistently with international law. *See The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118, 2 L.Ed. 208 (1804) ("an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains"); *MacLeod v. United States*, 229 U.S. 416, 434, 33

S.Ct. 955, 961, 57 L.Ed. 1260 (1913) (statutes should be construed consistently with American obligations under international law); *see also Filartiga v. Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980) (U.S. courts bound by the law of nations). Indeed, the legislative history of the FSIA indicates that Congress intended the Act to create "a statutory regime which incorporates standards recognized under international law." H.R.REP. NO. 1487, 94th Cong., 2d Sess. at 14 (1976). The only way to reconcile the FSIA's presumption of foreign sovereign immunity with international law is to interpret § 1605(a)(1) of the Act as encompassing the principle that a foreign state implicitly waives its right to sovereign immunity in United States courts by violating *jus cogens* norms.

Construing § 1605(a)(1) to include as an implied waiver a foreign state's breach of a *jus cogens* norm is not at odds with the language and legislative history of the FSIA, which supply scant guidance as to the provision's meaning. The 1976 House Report lists two examples of implicit waivers which, at the time of the Report, had been recognized by United States courts: (1) where a foreign state has agreed to arbitration in another country; and (2) where a foreign state has agreed that the law of a particular country should govern a contract. *See* H.R. REP. NO. 1487, 94th Cong., 2d Sess. 18 (1976). In addition, the Judiciary Committee suggested one more example— "where a foreign state has filed a responsive pleading in an action without raising the defense of sovereign immunity." *Id.* This list is neither exclusive nor exhaustive, however, and courts are by no means constrained to these three examples of implied waiver. In *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 722 (9th Cir. 1992), for example, the Ninth Circuit concluded that where a foreign state attempts to use the courts of the United States to facilitate the persecution of an individual, it has implicitly waived its claim to immunity from suit for such conduct.[3] *Cf. Amerada Hess*, 488 U.S. at 442-43, 109 S.Ct. at 692-93 (no waiver under § 1605(a)(1) where foreign state signed an international agreement containing no mention of a waiver of immunity to suit in the United States or even the availability of a cause of action in the United States). Nothing in the legislative history of § 1605(a)(1) forecloses a finding that a state implicitly waives immunity when it transgresses one of the few universally accepted norms known as *jus cogens*.

Moreover, I disagree with my colleagues that the "*jus cogens* theory of implied waiver is incompatible with the intentionality requirement implicit in § 1605(a)(1)." Maj. Op. at 1174. The implicit intentionality requirement stems from several decisions that have limited the implied waiver exception to cases in which the foreign sovereign "contemplated" the involvement of United States courts. *See, e.g., Seetransport Wiking Trader v. Navimpex Centrala*, 989 F.2d 572, 578-79 (2d Cir. 1993) (finding implicit waiver where defendant was an agency or instrumentality of a foreign state signatory to the Convention on the Recognition and Enforcement of Arbitral Awards and therefore must have contemplated enforcement actions in other signatory states, including the United States); *Siderman*, 965 F.2d at 721-22 (finding implicit waiver where foreign state defendant "not only envisioned United States court participation in its persecution of the [plaintiffs], but by its actions deliberately implicated our courts in that persecution"); *cf. Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 378 (7th Cir. 1985) (no implicit waiver where no reason to conclude that foreign sovereign anticipated that international agreements to which it was a signatory would be enforced in U.S. courts). In inflicting theretofore unimaginable atrocities on innocent civilians during the Holocaust, Germany could not have helped but realize that it might one day be held accountable for its heinous actions by any other state, including the United States. *See supra* § I. The magnitude of the acts put the perpetrators on notice that they were violating "principles common to the major legal systems of the world." *Report to the President from Robert H. Jackson, Chief Counsel for the United States in the Prosecution of Axis War Criminals, reprinted in* 39 AM.J.INT'L L. 178, 186 (Supp.1945). Adhering to such principles, now termed *jus cogens* norms,[4] is an obligation *erga omnes*—an obligation of the state toward the international community as a whole—*see Barcelona Traction Light & Power Co. (Belg. v. Spain)*, 1970 I.C.J. 4, 32 at ¶ 33 (Feb. 5), and by abdicating its responsibility to act in accordance with such norms, Germany consciously waived its right to any and all sovereign immunity.

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[3] I disagree, however, with the Siderman court's finding that the Supreme Court's approach in *Amerada Hess*, 488 U.S. at 436, constrained it to hold that because the FSIA does not specifically provide for an exception to immunity when a state violates a *jus cogens* norm, such a violation cannot confer jurisdiction under the FSIA. *Siderman*, 965 F.2d at 718-19. The Ninth Circuit failed to recognize that when a state transgresses a *jus cogens* norm, it does bring itself within the confines of an exception to the FSIA—the implied waiver exception.

Furthermore, a finding that Germany implicitly waived its immunity in this case is faithful to the primary rationale for the narrow construction of § 1605(a)(1)—preventing judicial interference with the notions of grace and comity that underlie the FSIA. *See Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 445 (D.C.Cir. 1990); *see also Seetransport Wiking*, 989 F.2d at 577 (broad interpretation of § 1605(a)(1) would "vastly increase the jurisdiction of the federal courts over matters involving sensitive foreign relations"). An exercise of jurisdiction over a foreign state for claims of genocide and enslavement does not awaken traditional comity concerns, particularly where, as here, both of the political branches of government have voiced strong support for the plaintiff.

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[4] Although the *jus cogens* terminology gained new coinage after World War II and the Nuremberg trials, at the time of the war the norms prohibiting genocide and enslavement were already universally accepted as nonderogable. *See* Klein, *Customary International Law*, 13 YALE J. INT'L L. at 340 ("Long before Hitler came to power, the international community had been unanimous in considering acts such as those perpetrated by the Nazis to be criminal.").

In the absence of any indication that Congress intended to exclude from the scope of § 1605(a)(1) the concept that a foreign state waives its immunity by breaching a peremptory norm of international law, I believe that the only way to interpret the FSIA in accordance with international law is to construe the Act to encompass an implied waiver exception for *jus cogens* violations. Congress did not intend to thwart the opportunity of an American victim of the Holocaust to have his claims heard by the United States judicial system. Because I cannot agree that the FSIA requires us to slam the door in the face of Hugo Princz, I dissent.[5]

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[5] I of course hazard no opinion on the substantive validity of Germany's nonjurisdictional defenses and the ultimate availability of monetary relief for Princz. Because we found that the district court's finding of subject-matter jurisdiction was immediately appealable, the merits of this case are not before us.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Hugo Princz,) Civil Action No.
Appellee,) 92-0644
) (Stanley Sporkin)
v.)
)
The Federal Republic)
of Germany,)
Appellant)
)

FILED APRIL 16, 1993

ORDER

In light of the decision of the Court of Appeals for the Distrcit of Columbia date April 14, 1993 regarding the above-captioned proceedings, it is hereby

ORDERED that all hearings and other proceedings before this Court in the above-captioned case are suspended pending further order from this Court.

Dated: 4/16/93

s/Stanley Sporkin
United States District Court

APPENDIX E

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Filed April 14, 1993

Nos. 92-7247 & 93-7006

HUGO PRINCZ,
APPELLEE

v.

FEDERAL REPUBLIC OF GERMANY,
APPELLANT

Appeals from the United States District Court
for the District of Columbia
(92cv00644)

ON APPELLEE'S MOTION TO DISMISS

Before: WALD and RUTH BADER GINSBURG, *Circuit Judges.*

ORDER

Upon consideration of the appellee's motion to dismiss, the opposition thereto, appellee's motion to exceed page limitations and the reply to the opposition to the motion to dismiss; appellant's emergency motion for stay, the opposition thereto and appellee's cross-motion for summary affirmance, and the reply; it is

ORDERED that the appellee's unopposed motion to exceed page limitations be granted. The Clerk is directed to file the lodged document. It is

FURTHER ORDERED that appellee's motion to dismiss be denied. A district court's denial of a foreign state's motion to dismiss on grounds of sovereign immunity is immediately appealable. *See Foremost-McKesson v. Islamic Republic of Iran*, 905 F.2d 438, 443 (D.C.Cir. 1990). It is

FURTHER ORDERED that appellant's emergency motion for stay of all proceedings in the district court be denied as unnecessary. Because an appeal properly pursued from the district court's order divests the district court of control over those aspects of the case on appeal, *see Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58, 103 S.Ct. 400, 402, 74 L.Ed.2d 225 (1982) (*per curiam*) ("The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal."); *Apostol v. Gallion*, 870 F.2d 1335 (7th Cir. 1989) (appeal from denial of claims of qualified immunity divested district court of jurisdiction), exclusive jurisdiction to resolve the threshold issue this case presents vests in this court, and the district court may not proceed to trial until the appeal is resolved. It is

FURTHER ORDERED that appellee's cross-motion for summary affirmance be denied. The merits of the parties' positions are not so clear as to warrant summary action. *See Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987) (*per curiam*); *Walker v. Washington*, 627 F.2d 541, 545 (D.C.Cir.) (*per curiam*), *cert. denied*, 449 U.S. 994, 101 S.Ct. 532, 66 L.Ed.2d 292 (1980).

Per Curiam

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA CIRCUIT
April 7, 1993

Hugo Princz,	)	Civil Action No.
Appellee,	)	92-0644
	)	(Stanley Sporkin)
v.	)	
	)	
The Federal Republic	)	
of Germany,	)	
Appellant	)	
	)	

MEMORANDUM OPINION AND ORDER

SPORKIN, District Judge.

This matter is before the Court on Defendant's Motion for Stay of Proceedings pending its appeal of the Court's Order dated December 23, 1992 denying Defendant's motion to dismiss for lack of subject matter jurisdiction.

That Order was based on the Court's decision that a U.S. citizen, who was a victim of the Holocaust, has a constitutional right to proceed in a United States Court against the very nation that subjected him and his family to the most unspeakable and barbarous acts known to humankind ... [and that] under the circumstances of this case, a nation that does not respect the civil and human rights of an American citizen is barred from invoking United States law to block the citizen in his effort to vindicate his rights. In such a case, Plaintiff has a right to have his claim heard by a U.S. court. December 23, 1992 Memorandum Opinion and Order at 11-12.

The principal basis for Defendant's motion for a stay is its claim that Germany has shown a high likelihood of prevailing on the merits because this Court has no jurisdiction to entertain Plaintiff's action. The defendant somehow believes that the Court was tentative in its decision. In effect, it wants the Court to find that it erred in its prior decision and to hold that it has no jurisdiction to consider claims against a nation that (1) slaughtered in cold blood an American citizen's father, mother, two brothers and sister, all U.S. citizens; (2) forced a citizen of the United States to perform slave labor; (3) interned a citizen of the United States in various concentration camps solely because of his religion and citizenship; and (4) offered no, avenue of relief for the atrocities committed against Plaintiff in its own courts or through its administrative processes.

If Defendant believes this Court concurs in its assessment of the law, then it has misread the Court's earlier Opinion. It has become obvious that Defendant wants to preclude Plaintiff from obtaining a decision on the merits of his claim. There is absolutely no place left for Plaintiff to go to obtain reparations from Defendant's alleged barbarism and unspeakable acts. It is clear that even at this late date, the defendant is unwilling to recognize that the unspeakable acts it committed against the Jews were reprehensible and must be remedied. How else can Defendant explain why it has repeatedly denied Plaintiff the modest pension he has sought for nearly 50 years?

What this Court does not understand is exactly why the Defendant needs a stay in this case. This Court thought that the only contested issue was whether an American citizen has the right to sue the German Government in a U.S. Court for the atrocities he and his family suffered at the hands of the German Government. If that is the only issue, there is no need for a stay, unless of course the German Government now wants to contest whether in fact the Holocaust happened or that the German Government was responsible for it. If that is the case, then what the Defendant now wants is to deny that it was ever involved in the extermination of 6 million Jews or, if it was so involved, that its actions were somehow justified. It is totally mystifying to this Court why the German Government not only wants to attack this Court's jurisdiction, but also wants to reserve the right to contest the substance of Plaintiff's claim in the event it loses on the jurisdictional issue. Of course, if the German Government wants to try the Holocaust, this Court has no choice but to accommodate its wishes.

While it may seem unconscionable for the German Government to force the Plaintiff to reconstruct in a public forum the unbelievable atrocities he and his family were subjected to during the Holocaust, the Plaintiff will be required to do so if the German Government persists in its position not to concede the well-pled allegations of Plaintiff's complaint.

To put it another way, if it is not the German Government's intention to deny its responsibility for the Holocaust, then there is no need for a stay. The German Government has appealed this Court's ruling on jurisdiction. If Germany convinces the Court of Appeals that an American citizen cannot get redress in the Courts of his own land against a Government that has tortured and slaughtered his mother, father, brothers and sister and forced the Plaintiff himself to perform slave labor and was about to murder him when he was rescued by the Allied forces, then of course this litigation will be over and Defendant will have prevailed.

On the other hand, if this Court does have jurisdiction to consider Mr. Princz's complaint and the facts he alleges are conceded, then the only issue that remains is the amount of damages that should be awarded. A stay of such proceedings is not necessary to protect Defendant's rights. The defendant is entitled to litigate the amount of damages, and to require that it do so in the event its appeal is denied will in no way overburden the Defendant or cause it irreparable harm. The only issue that the Defendant may possibly have given up by not getting a stay is the ability to contest liability.

In a way, Mr. Princz is a symbol. If the German Government had won World War II, many American families would have been destroyed, as the Princz family was. What is critical to remember is that the German Government was totally lawless and recognized no principles that bind the nations of the world together. Not only did the German Government defy the laws of all nations, but it even refused to turn the Princz family over to the International Red Cross so that the family could be returned to the United States at the time the United States entered the War. When Germany instead set out to annihilate the Princz family, it committed a crime that goes far beyond anything acceptable to the civilized world.

Mr. Princz was repatriated only after a very costly war was fought, in which thousands of U.S. soldiers lost their lives. What Germany lost on the battlefield, it now seeks to win in the U.S. courts. It would be one of the greatest ironies to permit the German Government to be able to deny an American citizen redress in his own nation's courts. All Mr. Princz seeks is to vindicate rights which the German Government unlawfully stripped from him during World War II. Justice Arthur Goldberg once remarked that the Constitution of the United States is not a suicide pact.[1] Despite Defendant's position, that concept, in this Court's view, still persists.

Accordingly, Defendant's motion for a stay is denied. An appropriate Order accompanies this Opinion.

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[1] See *Kennedy* v. *Mendoza-Martinez*, 83 S. Ct. 554, 563 (1963); *Aptheker* v. *Secretary of State*, 84 S. Ct. 1659, 1665 (1964).

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA CIRCUIT
December 23, 1992

Nos. 92-0664

HUGO PRINCZ,
PLAINTIFF

v.

FEDERAL REPUBLIC OF GERMANY,
DEFENDANT

Steven R. Perles, Washington, DC, and David Sher, Arlington, VA, for plaintiff.

Peter Heidenberger, Chevy Chase, MD, and Thomas G. Corcoran, Jr., Berliner, Corcoran & Rowe, Washington, DC, for defendant.

MEMORANDUM OPINION AND ORDER

SPORKIN, District Judge.

This case is presently before the Court on defendant Federal Republic of Germany's Motion to Dismiss for lack of subject matter jurisdiction. Plaintiff, Mr. Hugo Princz, filed this action to recover damages sustained by him as a result of his internment by the Nazis during World War II. For the reasons stated below, Defendant's motion is denied.

I. Background

The background facts to this case as alleged by the plaintiff are as follows.

Mr. Princz is a Jewish American who was taken into custody by the Nazis during World War II and placed in a concentration camp for the duration of the War. At the time of his internment, Mr. Princz was an American citizen and an unemancipated minor, living with his mother, father, two brothers and a sister in what is now Czechoslovakia. His father, a naturalized American citizen, was engaged in business activities in Czechoslovakia. In 1942, approximately ninety days after the formal declaration of war between the United States and Germany, Mr. Princz and his family were arrested by the Slovak Fascist police, turned over to the German SS, and sent to Camp Maidanek in Poland.

Almost all Americans captured by the Nazis were released in a prisoner exchange sponsored by the International Red Cross. Mr. Princz and his family, all American Jews, were not released.

The atrocities committed by the German Government against the plaintiff and his family cannot adequately be described in words. Mr. Princz believes his parents and sister were killed in the concentration camp known as Treblinka. The German Government sent Mr. Princz and his two brothers to Auschwitz. Mr. Princz and his two brothers were then "leased" by the German Government to the German chemical cartel I.G. Farben and enslaved at a facility close to Auschwitz called Birkenau. During the course of his enslavement at Birkenau, Mr. Princz witnessed the intentional starvation of his two brothers. Mr. Princz was subsequently sent to the Warsaw Ghetto Camp, forced on the death march from Warsaw to Dachau, and enslaved at the Messerschmidt underground airplane factory. Mr. Princz is the only member of his family to survive the barbaric acts of the Nazi regime.

When World War II ended, Plaintiff was rescued from a freight car, packed with other half-dead concentration camp survivors, by U.S. troops. Most of the survivors were sent to Centers for Displaced Persons. Seeing that Mr. Princz had "USA" stenciled across his uniform, the U.S. troops sent him to an American military hospital instead.

For many years Mr. Princz has attempted to obtain a pension, as provided to thousands of other Holocaust survivors, or some other form of reparations from the West German government. The first German compensation act, providing for pensions for Holocaust survivors was passed in 1952. In 1955, Mr. Princz filed a claim for a pension. The United Restitution Office (URO), which was handling the disbursement of the pension funds, advised Mr. Princz that he was not eligible for a pension because he had been an American citizen at the time of his enslavement.

In 1965, the law providing for pensions administered by URO was amended. According to Mr. Princz, the 1965 amendment only extended the period during which survivors could file a claim through 1969. It did not expand the pool of eligible claimants.[1] For this reason he did not file a second claim pursuant to the 1965 law.

Subsequently, the Federal Republic of Germany set up a hardship fund of $1.2 billion to assist Holocaust survivors who, for excusable reasons, had not filed a timely application for a pension under the earlier laws. This fund is administered by the Jewish Claims Commission in New York; the German Government has no control over eligibility determinations or disbursement of the hardship funds.

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[1] Defendant asserts that the 1965 amendment did expand the scope of permissible claimants so as to have enabled plaintiff to file a claim under the law, but that the plaintiff failed to file such a claim. This is a disputed issue which is not before the Court at this time.

Mr. Princz did apply for a hardship payment from this fund. However, his counsel was advised that these funds are being reserved for genuine hardship cases. Since Mr. Princz has been able to work as a grocery clerk, and his wife has worked as a bookkeeper, he is not eligible to receive a hardship payment.

In 1984, Plaintiff sought the assistance of Senator Bradley of New Jersey, who subsequently enlisted the assistance of the U.S. Department of State. The German government formally advised the State Department that Mr. Princz did not qualify for any government-sponsored reparations. The State Department then attempted to obtain a so-called *ex gratia* reparation payment from the Defendant government, which declined to make such payment.

In 1986, counsel for plaintiff attempted to obtain an *ex gratia* payment from Germany. The Defendant's Embassy in the United States verified that Mr. Princz was a Holocaust survivor and requested that the German Foreign Ministry in Bonn submit such a request to the German Parliament. On December 8, 1987, plaintiff's counsel was advised that the German Foreign Ministry had declined to submit such a request.

According to counsel for Defendant at the December 11, 1992 hearing before this Court, Mr. Princz's situation was presented to the German Supreme Court, which held that the 1969 statute of limitations for filing pension claims was final, thereby precluding consideration of another application for a pension through the URO process at this time.[2]

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[2] Mr. Princz did not file a specific claim in the German courts against the Federal Republic of Germany. Rather, counsel for Germany advised the Court that, when presented with the issue involved in Mr. Princz's case, the German Supreme Court took up the matter as an administrative concern.

On March 15, 1992, a treaty concerning the unification of Germany between the United States and Germany became effective. To confirm an understanding reached between the United States and Germany in discussions leading up to this treaty, Germany's Federal Minister for Foreign Affairs sent a letter, dated 18 September 1990, to U.S. Secretary of State James Baker, in which he assured Secretary Baker that, after unification, the Federal Republic of Germany would "seek to provide expeditious and satisfactory resolution of claims of Jewish victims of the Nazi regime against the German Democratic Republic shortly after unification." This letter was attached to the State Department's September 24, 1990 report to the President on the treaty. Plaintiff has not received reparations as of this time.[3]

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[3] It is unclear whether the claims referred to in this letter included claims of both U.S. nationals who were interned in concentration camps and those whose property in occupied territories was expropriated during the War, or only claims of the latter. In a letter, dated September 11, 1990, Secretary Baker wrote to the German Foreign Minister to formally confirm the U.S. Government's position "concerning compensation to United States' citizens whose property was taken in the former Soviet Zone of occupation in Germany or in the Soviet sector of Berlin." The Secretary's letter continued, "[T]he United States is of the opinion that under international law claims of U.S. nationals that have been the subject of inter-governmental negotiation between the governments of the United States and the German Democratic Republic ... must be resolved in inter-governmental discussions between the Governments of the United States and the Federal Republic of Germany."

It is to these property claims of U.S. citizens that the German Foreign Minister's September 18, 1990 letter refers. The Foreign Minister's reference to the resolution of claims of Jewish victims of the Nazi regime does not specifically refer to U.S. citizens interned by the Nazis during the War. The Court does not understand why

Plaintiff believes that he is one of only two U.S. nationals who survived internment during the Holocaust. The other was captured in Holland and is receiving a pension.[4]

II. Jurisdiction

The sole issue before the Court at this time is whether or not the Court has jurisdiction over the Federal Republic of Germany to hear this case. Defendant, in its Motion to Dismiss, argues that since plaintiff's claim does not fit any of the exceptions to Congress' broad recognition of immunity to other nations contained in the Foreign Sovereign Immunities Act, 28 U.S.C. § 1330, plaintiff's complaint must be dismissed.

Finding that Congress intended to enact a comprehensive statutory scheme governing U.S. courts' jurisdiction over foreign nations,[5] the Supreme Court in *Argentine Republic v. Amerada Hess*, 488 U.S. 428, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989), held that the FSIA is "the sole basis for obtaining jurisdiction over a foreign state" in U.S. courts. Jurisdiction in such a case "depends on the existence of one of the specified exceptions to foreign sovereign immunity" found in the FSIA. *Id.*, 488 U.S. at 435, 109

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the State Department has not raised Mr. Princz's claim with the Federal Republic of Germany subsequent to this correspondence and the signing of the unification treaty. In any event, its failure to do so does not affect the ruling on the motion presently before the Court.

[4] The treaty between the Defendant and Holland permits Holland to determine survivors' pension eligibility. Under Dutch law, any survivor who was captured in Holland can receive a pension.

[5] As noted by the Supreme Court, the legislative history supports this conclusion. *See* U.S.Code Cong. & Admin.News 1976 6604-6635.

S.Ct. at 688 (citations omitted). This is the clearly stated rule.[6]

This case does not merely involve a violation of international law. This case involves an American whose most fundamental rights of citizenship and as a human being were violated. Mr. Princz was interned by the Nazis. He was enslaved by the German Government and German companies. He witnessed the tortured deaths of his two brothers and lost both parents and his sister to German brutality as well. To describe Auschwitz, one of the two concentration camps where he was interned, as a human butcher shop would be generous. What individuals like the plaintiff in this case suffered in the Holocaust were acts of barbarism, committed by a merciless government in flagrant disregard of international law, the laws of civilized societies and all principles of human decency.

The German government showed absolutely no respect for the laws of any other nation. The government extended no rights at all to the plaintiff or any member of his family. The German Government exterminated five members of a law-abiding American family without due process of law. Their only "crime" was being American Jews.

The Supreme Court did not have such extraordinary facts as those presently before this Court in rendering its decision in *Hess*. And the Court cannot believe that, in enacting the Foreign Sovereign Immunities Act, Congress contemplated a factual scenario akin to that at bar, let alone that it intended to bar a U.S. citizen from seeking redress against a nation standing in the shoes of his or her would-be butcher in U.S. courts in a case such as this. Therefore, this Court concludes that neither *Hess* nor the FSIA itself bars this Court from hearing the plaintiff's claim.

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[6] As noted by the Supreme Court, the legislative history supports this conclusion. *See* U.S.Code Cong. & Admin.News 1976 6604-6635.

One District Court for the District of Columbia has applied *Hess* to hold that U.S. courts lacked jurisdiction in a case involving a claim brought on behalf of a Swedish diplomat against the Soviet Union for his alleged unlawful seizure in 1945, subsequent imprisonment and possible death. *Von Dardel v. Union of Soviet Socialist Republics*, 736 F.Supp. 1 (D.D.C. 1990). The plaintiff in that case, however, was not a U.S. citizen.

This Court finds that the Federal Sovereign Immunities Act has no role to play where the claims alleged involve undisputed acts of barbarism committed by a one-time outlaw nation which demonstrated callous disrespect for the humanity of an American citizen, simply because he was Jewish. The Court cannot permit such a nation, which at the time these barbaric acts were committed neither recognized nor respected U.S. or international law, to now block the legitimate claims of a U.S. citizen by asserting U.S. law to evade its responsibilities.

A government which stands in the shoes of a rogue nation the likes of Nazi Germany is estopped from asserting U.S. law in this fashion. To allow otherwise would create a severe imbalance in the reciprocity and mutual respect which must exist between nations, and would work an intolerable injustice against the plaintiff and the principles for which this country stands. In a remarkable show of chutzpa, Defendant suggests that Mr. Princz sue I.G. Farben, one of the companies to whom the Nazis "leased" Mr. Princz. Perhaps I.G. Farben, one of the many companies complicit in the exploitation and extermination of hundreds of thousands of Jews during World War II should be held accountable for their crimes as Defendant suggests. This argument cannot absolve Defendant of its participation in these crimes against humanity. It only goes to show Defendant's complete lack of understanding of what this case is about. It was the German government which orchestrated and executed the mass exploitation and genocide of millions of human beings during World War II. This case is about the German Government's responsibility for these crimes as they affected Mr. Princz. It is not only about slave labor. Defendant simply cannot be relieved of its responsibility because of the involvement of other parties in causing the unconscionable mistreatment and suffering of Mr. Princz.

Defendant also argues that Mr. Princz can press his suit in German courts. This is not an acceptable alternative. Not only has the German Supreme Court already issued an administrative determination which indicates that Plaintiff's claim would be denied, but, according to the plaintiff, no foreign national has ever successfully brought a case such as this in Germany. While the Court recognizes that the German government of today is a far cry from the government of Adolph Hitler, the intransigence and lack of compassion shown by the government in its declination to consider the pleas made by the U.S. Department of State and a U.S. Senator on behalf of Mr. Princz and in the proceedings before this court confirm the slim odds Plaintiff has of achieving redress in the courts of that nation.

Congress did indeed fashion a comprehensive scheme regarding U.S. courts' jurisdiction over foreign nations. But Congress has not stripped Americans of their rights of citizenship or of their right to be protected by our government and our laws just because they travel overseas. When he left the shores of the United States in the early 1940's, Mr. Princz did not leave his citizenship behind; when he lived in Czechoslovakia he carried his citizenship with him; and when he was seized without cause by the Germans, he still retained his American citizenship.

If Mr. Princz's citizenship means anything, it must mean that he can seek vindication of his rights in the courts of this nation. Congress cannot have intended to force Mr. Princz, an American citizen with scant financial resources, to seek justice in the courts of the very country which so brutally violated his dignity and humanity and subsequently has indicated no willingness to recognize his just claim.

An American citizen cannot be denied access to the only forum that can vindicate his rights as a citizen by a nation that robbed him of those rights. To permit this case to go forward will only enable Mr. Princz to end his odyssey for basic justice, a journey that he embarked on some 30 or 40 years ago. It is one thing to relate the horrors the plaintiff has experienced at the hands of the Nazi government. It is another horrendous indignity to require this individual to spend the rest of his life seeking redress for the unspeakable crimes committed against him and his family by the defendant. An American court must be available to the plaintiff, particularly since every other avenue of redress has been foreclosed to him.

To put it in another way, a United States citizen, who was a victim of the Holocaust, has a constitutional right to proceed in a United States Court against the very nation that subjected him and his family to the most unspeakable and barbarous acts known to humankind. To hold otherwise would complete the stripping of Mr. Princz's most valuable rights of citizenship—a process begun many years ago when the German government brutalized and murdered his family, forced him on a death march and placed him in a slave camp. To accept defendant's position would make a mockery of the Holocaust memorial project, in which millions of dollars have been spent to erect a monument in this nation's capitol to memorialize the Holocaust and send a message to the world that it shall never happen again.

What this Court holds today is that under the circumstances of this case, a nation that does not respect the civil and human rights of an American citizen is barred from invoking United States law to block the citizen in his effort to vindicate his rights. In such a case, Plaintiff has a right to have his claim heard by a U.S. court.[7]

APPENDIX A

Excerpt from Transcript of December 11, 1992 Hearing in Civil Action No. 92- 644, pp. 12-15.

MR. PERLES: He is only one of two American citizens who are Holocaust survivors, Your Honor ... that we know of. The other individual was captured in Holland, and he received a pension, because under Dutch law ... they go on a basis of where you were captured, not the nationality of the captured individual.

THE COURT: Well, was he originally a U.S. citizen and he was caught in Germany? What happened? How did he get into the concentration camp?

MR. PERLES: He was a U.S. National and at the time an unemancipated minor with his family. His father was a U.S. National, and an American businessman in what is now called Slovakia or Czechoslovakia, and they were arrested after—roughly 90 days after the bombing of Pearl Harbor. Their U.S. documents were destroyed. They were turned over by the Slovak Fascist police to the SS and their U.S. papers simply weren't honored.

THE COURT: And so he is—you say he was a U.S. National. Was he an American citizen?

MR. PERLES: Yes, he was an American citizen.

THE COURT: And his father was an American citizen?

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[7] Set forth in Appendix A to the Court's Opinion is a colloquy that took place at oral argument between Court and counsel for plaintiff. This colloquy is revealing as to what the plaintiff was subjected to during the Holocaust.

MR. PERLES: And his father was an American citizen. His father was a naturalized American citizen.

THE COURT: And so they put the whole family in the concentration camp?

MR. PERLES: That is correct, Your Honor. They should have been swapped in the International Red Cross sponsored prisoner exchange, which is what happened to almost all captured Americans. He was not—he and [h]is family were not Slovak.

THE COURT: Well, was he put in because he was Jewish, or was he put in because he was American?

MR. PERLES: Well, I can't answer that question, Your Honor. Presumptively he was put in because he was a Jewish American. But that's a question that I'm never going to be able to reconstruct. You know ... I have to ask an individual who was then 17 years old, what happened during this confused time. He may never know why he was never swapped.

THE COURT; And they put the whole family, the mother, father and the son in?

MR. PERLES: And brothers and sister[ ]. He is sole survivor.

THE COURT: Which concentration camp?

MR. PERLES: He and two brothers went to Auschwitz. His parents and his sister were presumptively killed in [Maidanek]. One brother escaped and was killed in the Warsaw ghetto uprising.

THE COURT: Where was the other one killed?

MR. PERLES: He was in the—he was a participant in the Warsaw ghetto uprising.

THE COURT: One brother.

MR. PERLES: One brother who escaped.

THE COURT: What about the other brother?

MR. PERLES: They were both killed in Auschwitz in Mr. Princz' presence. Two younger brothers were killed with him.

THE COURT: How were they killed?

MR. PERLES: They were starved to death in the Berkenau Hospital, Your Honor. And they were Americans. In fact, if you look at what we've been able to reconstruct of the German records, they indicate that Mr. Princz—that they knew Mr. Princz was an American National. In fact, the reason he doesn't have a pension is he never went to a center for displaced persons. The reason he didn't go to a center for displaced persons is because the Germans stenciled his nationality on his chest. It says USA on his uniform, and when an American [Army] corp[s] liberated him, they're pulling all these half dead people out of freight cars, and there is this man that says USA across his chest.

So instead of sending him with the rest of these half dead people to a center for displaced persons, they wanted to give him better medical treatment, so he went to an American military hospital. And he survived because he went to an American military hospital. But because he was never in that center for displaced persons, because he was in an American military hospital, he was not eligible under German law for a $500 a month pension.

This case is about Mr. Princz's 30 year quest for a $500 a month pension. I've been trying since March 9, 1986 to get this man his $300 to $500 a month pension ...

THE COURT: Have you filed in Germany? Have you brought any action in Germany?

MR. PERLES: We have not brought an action in Germany, and I must say I've read the—not the cases themselves, but the scholarly works describing them. No foreign national has ever successfully brought a case in Germany, and I don't view it as a cost effective undertaking for someone of Mr. Princz' age and financial standing. It's just not a viable option for him.

THE COURT: So they robbed this person of his citizenship, of his life—I mean of his liberty. Go ahead.

MR. PERLES: And they won't give him a pension. That's the case.

ORDER

The Court currently has before it Defendant's Motion to Dismiss. Upon consideration of Defendant's motion and Plaintiff's opposition thereto, and after hearing oral argument from counsel for both sides, for the reasons stated in the foregoing Opinion, it is hereby

ORDERED that Defendant's motion is denied.

APPENDIX H

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HUGO PRINCZ,)
)
Plaintiff-Appellee,)
) No. 92-7247, 93-7006
v.)
)
FEDERAL REPUBLIC)
OF GERMANY,)
)
Defendant-Appellant.)
)

MOTION OF THE UNITED STATES OF AMERICA FOR PUBLICATION OF THIS COURT'S APRIL 14, 1993 ORDER

Pursuant to Rule 14(e) of the Rules of this Court, the United States of America requests this Court to publish its April 14, 1993 Order in this case. In support of this motion, the United States states as follows:

1. The instant appeals were taken by the defendant-appellant Federal Republic of Germany ("FRG") from various district court orders rejecting its claim of immunity under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1300, 1602, et seq. FRG sought a stay of proceedings in this Court on the basis that immunity under the FSIA is an immunity from suit and therefore it should not be burdened with further trial proceedings while its appeal from the district court's denial of its claim of immunity is pending before this

Court.[1] Plaintiff-Appellant Hugo Princz opposed FRG's request for a stay and sought either dismissal of the appeal or summary affirmance of the district court's decision denying immunity.

2. On April 14, 1993, this Court (Wald and R.B. Ginsburg, JJ.), denied Princz's motion to dismiss the appeal or for summary affirmance. Order, at 1-2. The Court also denied FRG's motion for stay as "unnecessary," stating that

> [b]ecause an appeal properly pursued from the district court's order divests the district court of control over those aspects of the case on appeal * * *, exclusive jurisdiction to resolve the threshold [immunity] issue this case presents vests this court, and the district court may not proceed to trial until the appeal is resolved.

Id. citing, inter alia, Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982) (per curiam); Apostol v. Gallion, 870 F.2d 1335 (7th Cir. 1989).

3. The United States believes this Order warrants publication under the standards announced in Rule 14(b) of the Rules of this Court. First, this Order "resolves" a "substantial issue" which, to our knowledge, has not been publicly ruled on by this Court — viz., whether a district court retains jurisdiction to proceed to trial when a defendant appeals the district court's denial of his claim of immunity from suit. D.C. Cir. R. 14(b) (1). In holding that an appeal in such circumstances divests the district court of jurisdiction to proceed, this Court has agreed with the similar holdings of the Ninth, Tenth and Seventh Circuits on this issue. See Cal-Almond, Inc. v. U.S. Department of Agriculture, 960 F.2d

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[1] The district court had previously denied FRG's request for a stay and had indicated its intention to proceed to trial. April 7, 1993 Memorandum Opinion and Order.

104, 105 (9th Cir. 1992); Stewart v. Donges, 915 F.2d, 574-78 (10th Cir. 1990); Apostol v. Gallion, 870 F.2d 1335, 1338-39 (7th Cir. 1989). See also Yates v. City of Cleveland, 941 F.2d 444, 448-49 (6th Cir. 1991) (discussing waiver of the appeal right). However, in contrast to these prior cases (which involved the issue of official immunity from constitutional violations), the instant ruling is in the context of an appeal from a denial of immunity under the FSIA. The Court's ruling, which is the first case to our knowledge to reach this issue under that statute, consequently resolves an important issue of "first impression." Such an important holding warrants publication. D.C. Cir. R. 14(b) (1).

Second, this holding "significantly clarifies a rule of law previously announced by the Court." D.C. Cir. R. 14(b) (2). In Foremost-McKesson, Inc. v. Islamic Republic of Iran, 905 F.2d 438, 443 (D.C. Cir. 1990), this Court held that a district court's "denial of the foreign state's motion to dismiss on the grounds of sovereign immunity" under the FSIA is immediately appealable to this Court. In reaffirming that rule (see Order, at 1), this Court has clarified an important incident of such an appeal — i.e., it generally divests a district court of jurisdiction to proceed to trial until the immunity issue is resolved. Thus publication is warranted.

Finally, the order is of "general public interest." D.C. Cir. R. 14(b) (7).[2] Sovereign immunity is a frequent threshold issue in suits against foreign sovereigns under the FSIA. Also, the federal government is frequently involved in the similar "threshold" issue of immunity of federal officers from suit for constitutional violations. See Mitchell v. Forsyth, 472

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[2] The other factors listed in Rule 14(b) for publication (calling attention to an overlooked rule of law, criticizing or questioning existing law, resolving an inter- or intra-circuit conflict or reversing a published district court decision) appear inapplicable to the present case.

U.S. 511 (1985); Harlow v. Fitzgerald, 457 U.S. 800 (1982) and cases cited pp. 2-3 supra. This Court's Order clarifies that a motion to stay is unnecessary when a defendant appeals a denial of a claim of immunity from trial (such as under the FSIA or official immunity).[3] Publication of the Court's Order will provide important guidance to both the district courts in this Circuit and to counsel on the procedures which should be followed in the event of an appeal from a denial of a claim of immunity from suit. It will also avoid the filing of many unnecessary stay motions, both before the district courts and before this Court.

For the reasons state above, the United States of America requests this Court to publish its April 14, 1993 Order in this case.

Respectfully submitted,

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May 1993

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[3] The other context in which courts have reached a similar result is when a criminal defendant seeks to appeal a denial of a claim of double jeopardy. See United States v. Hines, 689 F.2d 934, 936-37 (10th Cir. 1982); United States v. Leppo, 634 F.2d 101 (3d Cir. 1980); United States v. Dunbar, 611 F.2d 985 (5th Cir.) (in banc), cert. denied, 447 U.S. 926 (1980).

Supreme Court, U.S.
FILED
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No. 94-909

In The

Supreme Court of the United States

October Term, 1994

HUGO PRINCZ,

Petitioner,

v.

THE FEDERAL REPUBLIC OF GERMANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the denial of a foreign government's motion to dismiss for lack of subject-matter jurisdiction is immediately appealable.

2. Whether the atrocities committed by the Nazi regime during World War II waived the sovereign immunity of the Federal Republic of Germany in a suit brought under the FSIA more than fifty years later where the petitioner has refused to accept compensation agreed upon among the Federal Republic, the United States and the other Western Allies, the State of Israel, and the Conference of Jewish Material Claims against Germany.

3. Whether forcing petitioner to work without pay in Poland and Germany between 1942 and 1945 had a "direct" effect in the United States within the meaning of the FSIA's commercial activity exception to foreign sovereign immunity.

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In The

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

The respondent, the Federal Republic of Germany, respectfully requests that the Court deny the petition for a writ of certiorari, seeking review of the judgment entered by the Court of Appeals on July 1, 1994, ordering dismissal of the suit for want of subject matter jurisdiction.

COUNTERSTATEMENT OF THE CASE

In accordance with Rule 15.1 of the Rules of this Court, the Federal Republic of Germany (''Federal Republic'' or ''Germany'') brings to the Court's attention facts supported by the record that are omitted from the petition and that have a bearing on the question of what issues would properly be before the Court if certiorari were granted.

A. The German Compensation System for Survivors of Nazi Persecution

Following the unconditional surrender of the Third Reich, the three Western occupying powers issued guidelines in their respective zones of occupation for compensation of persons who, as a result of their race, religion or political convictions, had been persecuted by the Nazi government. In 1949, laws providing for such compensation were issued by the individual German states (Länder) in the American, British, and French occupation zones and administered under the supervision of the occupying powers.

Immediately upon its establishment in 1949, the Federal Republic considered compensation of the victims of the injustices committed by the Nazi regime as one of its most important and urgent tasks. The legislation enacted thereafter by the Federal Republic went beyond the directives issued earlier by the Allied Powers. It was considered as an independent act of moral responsibility that Chancellor Adenauer described as a "debt of honor" of the German people. (R.Add. 5a).[1] Some four decades later, the Commission on Human Rights of the United Nations, in its Report of July 2, 1993, summarized the claims programs enacted and implemented by the Federal Republic thus:

> 125. It should also be recalled that to this date the most comprehensive system of reparations was introduced by the Federal Republic of Germany for compensating victims of Nazi persecution. As was correctly observed more than 20 years ago in an enlightening overview of this important precedent: ". . .the payments have meant (for numerous victims) the difference between abject poverty and a dignified life with modest security. This does not

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[1] The reference "R.Add." is to the documents reproduced in the addendum to this brief.

> mean that complete or even genuine restitution has been made. The persecutions by the Nazi regime were unparalleled and unique in their scope and inhumanity. They cannot be atoned and cannot be forgotten. However, from an historical and legal point of view, the compensation programme and reparations constitute a unique operation." (R.Add. 12a, hereafter "UN Report")

The first uniform federal compensation law (Bundesentschädigungsgesetz, hereafter "BEG") was enacted on October 1, 1953.[2] Under that law, individuals were eligible for compensation, if (a) they resided on January 1, 1947 within the territory covered by the law, (b) resided within the territory of the German Reich on December 31, 1937 and left Germany prior to January 1, 1947 or (c) were refugees within the meaning of the Geneva Convention and resided within the territory covered by the law. §§8 and 160 BEG; R.Add. 13a-15a. The nationality of a claimant was irrelevant to qualify under the program. Compensation consisted of a lump sum payment, depending on length of imprisonment, injuries suffered and loss of livelihood or, at the election of the claimant, a monthly pension.

In 1948, a non-profit legal aid organization, the United Restitution Organization ("URO"), was formed to lobby for reparation legislation in the three Western occupation zones of Germany and Austria. In the following years, the organization assisted victims of the Nazi regime in filing claims for compensation. URO wrote to Mr. Princz on November 22, 1955 that it could not assist him in filing a claim for compensation under the 1953 BEG because he had been an American citizen at the time of persecution and because he could not meet the residency requirements noted above. (R.Add. 16a). Mr. Princz was indeed ineligible under the 1953 federal law because of his inability to meet the law's residency or refugee status requirements; however, he was not ineligible because he was an American citizen. (R.Add. 17a; cf. Pet. at 6).

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[2] The territory covered by the law was the territory of the Federal Republic of Germany before reunification.

Eligibility under the original BEG was based on the principle of territoriality, not nationality. (UN Report at § 108; R.Add. 9a). As a result, numerous victims of Nazi persecution were unable to meet the requirements of the BEG. To render these claimants eligible for compensation, numerous states (Luxembourg, Norway, Denmark, Greece, Netherlands, France, Belgium, Italy, Switzerland, Austria, United Kingdom, Sweden) concluded with the Federal Republic of Germany in the years 1959-1961 "global agreements" under which these states received lump sum payments for distribution to individual claimants. (UN report at § 110; R.Add. 10a). The United States did not seek such a "global agreement" with the Federal Republic.

Earlier, in 1951, the Federal Republic of Germany had begun negotiations with the state of Israel and the Conference on Jewish Material Claims against Germany ("Claims Conference") to assure a fair and acceptable compensation system for Jewish victims of the Nazi regime. The Claims Conference represents 24 Jewish organizations worldwide.[3] These negotiaions culminated in a treaty with the State of Israel and the so-called Luxembourg Protocols 1 and 2. These accords resulted in payments of $1.8 billion to Israel and $300 million to the Claims Conference. (R.Add. 19a-34a).

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[3] Agudath Israel World Organizaton; *Alliance Israelite Universelle;* American Jewish Committee; American Jewish Congress; American Jewish Joint Distribution Committee; American Zionist Council; Anglo-Jewish Association; B'nai B'rith; Board of Deputies of British Jews; British Section, World Jewish Congress; Canadian Jewish Congress; Central British Fund; *Conseil Representatif des Juifs de France;* Council for the Protection of the Rights and Interests of Jews from Germany; *Delegacion de Associaciones; Israelitas Argentinas (D.A.I.A.)*; Executive Council of Australian Jewry; Jewish Abency for Palestine; Jewish Labor Committee; Jewish War Veterans of the U.S.A.; South African Jewish Board of Deputies; Synagogue Council of America; World Jewish Congress; *Zentralrat der Juden in Deutschland.*

Subsequent to the entry into force of the Protocols and further negotiations with the Claims Conference, the German compensation program was amended in 1965, 1980 and in 1992 to cover additional survivors who had received no compensation. As of 1994, Germany had paid over $74.3 billion to some 2 million claimants. An additional $10 to 12 billion will be disbursed in pension payments in the future. Some 40,000 of these recipients live in the United States. (R.Add. 37a-38a).

As noted, petitioner was ineligible for compensation under the original 1953 federal law because of his inability to meet either the residency or refugee status requirements, but he became fully eligible to file a claim for compensation under the 1965 amendment to the law. The deadline for filing claims expired on December 31, 1969. Petitioner did not apply for compensation under the 1965 amendment until some two decades later (on March 11, 1991); the German Consulate General in New York advised Mr. Princz by letter of April 10, 1991 that his request had to be denied because the time for filing it had long ago expired. (R.Add. 39a).

At present, the petitioner is once again eligible to receive compensation. Pursuant to article two of the agreement implementing the unification of Germany, the two Germanies agreed to establish a fund to provide for compensation of victims of Nazi persecution "who so far had received no compensation or only minimal compensation." (R.Add. 47a). In implementation thereof, an agreement was entered into with the Claims Conference on October 9, 1992 for the payment of

$690 million in compensation. (R.Add. 48a).[4]

The agreement negotiated with the Claims Conference provides for a one time bridge payment, with monthly payments to begin on August 1, 1995. Petitioner is eligible to receive a lump sum payment of DM 5,000 (approx. $3,400), and thereafter a monthly pension of DM 500 (about $340). The Claims Conference receives each month between 500 and 800 new applications from U.S. residents. To date, some 70,000 persons have applied for Article Two funds, 19,000 of whom are U.S. residents. 4,000 claimants living in the United States have so far received determinations that they qualify for pensions. (R.Add. 54a-56a).

In the view of the Federal Republic, petitioner should file for compensation from Article 2 funds as have 70,000 others. (R. Add. 54a-57a). Petitioner, however, has not filed for compensation under this latest compensation program, and his counsel has advised the German authorities that he does not intend to do so. Instead, on March 12, 1992, he commenced the instant action in the district court under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602 *et seq.* ("FSIA"), seeking a judgment for $17 million.

Petitioner refers repeatedly to unsuccessful attempts at the diplomatic level to settle this case. Pet. at 7, 20-23.[5] Germany stated in the course of these discussions that it was bound by the laws, treaties, and agreements covering compensation of survivors of Nazi persecution and could not pay Mr. Princz millions of dollars in compensation when others had received such smaller amounts as agreed upon with the United States, the other Western powers, the State of Israel, and the Claims Commission. If Germany were to pay what Mr. Princz demands to all persons similarly situated it would exceed the financial capacity of the Federal Republic.

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[4] In an exchange of notes, the United States, the Federal Republic, the United Kingdom, and the Republic of France, agreed on the continuation of the German compensation program as it had existed while Germany was divided. 30 I.L.M. 454 (1991); (R. Add. 41a-46a). Article 4c of the notes provides for "the application of the correspondent provisions of the Federal Restitution Law and Federal Compensation Law" in the former East German territory. (R.Add. 44a). The Luxembourg Protocol No. 2, para 8, provides that annuities shall not exceed 500 DMark per month. (R.Add. 21a).

B. Proceedings in the District Court

Petitioner's complaint asserted that he was forced to work between 1942 and 1945 at Auschwitz and Dachau in factories owned by German corporations such as I.G. Farben and Messerschmidt that produced war material. The corporations paid the Nazi Government for petitioner's labor, but petitioner received no recompense. Petitioner's complaint further asserted that the Federal Republic was not immune from suit under the FSIA because (1) it had impliedly waived its immunity from suit, and (2) because the action was based upon a commercial activity that caused a direct effect in the United States. The Federal Republic moved to dismiss for lack of subject-matter jurisdiction under the FSIA. At the oral argument on the motion in December 1992, the district court stated that the FSIA had no role to play in this suit and ruled that petitioner's suit was properly brought in his court because he was an American citizen. (R.Add. 59a). The court denied the

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[5] Petitioner's representation (Pet. at 7) that Germany has steadfastly denied Princz compensation is incorrect. As shown earlier, he was eligible under a law passed in 1965 and is now eligible under a law passed in 1992.

Federal Republic's motion from the bench, and scheduled the case for trial in May 1993. On numerous occasions during the course of oral argument the district court stated that the Federal Republic was not entitled to the protection of U.S. law because of the lawless acts of the Nazi regime. (R. Add. 58a-63a).

The Federal Republic appealed from the oral denial of its motion to dismiss. Two days after the appeal was noticed, the district court filed a memorandum opinion and order ruling that Princz had a Constitutional right to proceed against the Federal Republic in a United States Court. Pet. App. 59a. The Federal Republic noticed a second appeal.

C. Proceedings in the Court of Appeals

On April 14, 1994, the court of appeals issued an order directing the district court not to proceed to trial until the appeal was resolved. *Princz v. Federal Republic of Germany*, 998 F.2d 1, 2 (D.C. Cir. 1994) (*per curiam*) (Pet. App. 44a). The court of appeals also denied Princz's motion to dismiss the appeal or for summary affirmance. (*Ibid.*).

Thereafter, on July 1, 1994, a divided panel of the court of appeals reversed the district court's jurisdictional ruling and dismissed the case for lack of subject-matter jurisdiction under the FSIA. *Princz v. Federal Republic of Germany*, 26 F.3d 1166 (D.C.Cir. 1994)(Pet. App. 3a). With two exceptions,[6] the petition accurately summarizes the main points of the majority opinion. Pet. at 9-11. The dissenting judge would have interpreted the implicit waiver provision of the FSIA, §1605(a)(1), to vest subject-matter jurisdiction against the Federal Republic. In the dissenter's view, such an interpretation would accord with international law and the emerging doctrine that a foreign state which violates *jus cogens* forfeits all claims to immunity from suit. Pet. App. 31a-42a. The panel's majority disputed this rationale, stating:

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[6] First, Germany did not ask the United States to file an *amicus* brief in support of its jurisdictional defense. Second, the majority below did not "appear to concede" that the enslavement of petitioner was a commercial act. The court assumed it was commercial *arguendo* Pet.App. 14a; cf. Pet. at 8-9.

> We think that something more nearly express is wanted before we impute to the Congress an intention that the federal courts assume jurisdiction over the countless human rights cases that might well be brought by the victims of all the ruthless military juntas, presidents-for-life, and murderous dictators of the world, from Idi Amin to Mao Zedong. Such an expansive reading of §1605(a)(1) would likely place an enormous strain not only upon our courts but, more to the immediate point, upon our country's diplomatic relations with any number of foreign nations. In many if not most cases the outlaw regime would no longer even be in power and our Government could have normal relations with governments of the day — unless disrupted by our courts, that is. Pet. App. 20a, n. 1.

ARGUMENT

I. The Court of Appeals' Review of the District Court's Jurisdictional Ruling is Consistent with Decisions of this Court and All Other Circuits.

The court of appeals decision to hear the Federal Republic's appeal does not conflict with the decision of any other court of appeals that has heard appeals by foreign states under the collateral order doctrine, *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). From the inception of the FSIA, all Circuits that have addressed the question have ruled unanimously that a denial of sovereign immunity is immediately appealable.[7]

The only FSIA case that reached this Court in which a foreign state appealed a district court's denial of immunity was *Republic of Argentina v. Weltover,* _____ U.S. _____, 112 S.Ct. 2160 (1992).[8] No issue was raised in this Court or in the court of appeals as to the appealability of the district court's order denying Argentina's motion to dismiss for lack of subject-matter jurisdiction.

It is also worthy of note that in the Congressional hearings on the bill that became the FSIA, the Department of State took the position that "the purpose of sovereign immunity in modern international law is to promote the functioning of all governments by protecting a state from the burdens of defending law suits abroad which are based upon its public acts." *Hearings on H.R. 11315 before the Subcomm. on Administrative Law and Governmental Relations of the House Committee on the Judiciary,* 94th Cong., 2d Sess. 27 (1976) (hereafter "hearings on H.R. 11315") (testimony of Monroe Leigh, Legal Adviser, Department of State). The Executive Branch continues to maintain this position on collateral appeals in FSIA cases, as was recently manifested by the Government's motion to publish the stay order in this case (Pet.App. 64a), which explained the appealability of rulings by district courts denying sovereign immunity from suit to foreign states. The court of appeals' order was subsequently published in *Princz v. Federal Republic of Germany*, 998 F.2d 1 (1993).

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[7] *Foremost-McKesson v. Islamic Republic of Iran,* 905 F.2d 438, 443 (D.C. Cir. 1990); *Weltover, Inc. v. Republic of Argentina,* 941 F.2d 145 (2d Cir. 1991), *aff'd,* ____ U.S. ____, 112 S.Ct. 2160 (1992); *Stena Rederi AB v. Comision de Contratos del Comite,* 923 F.2d 380 (5th Cir. 1991); *Gould, Inc. v. Pechiney Ugine Kuhlman,* 853 F.2d 445, 450 (6th Cir. 1988); *Rush-Presbyterian-St. Luke's Medical Center v. The Hellenic Republic,* 877 F.2d 574, 576, n.2 (7th Cir. 1989); *Segni v. Commercial Office of Spain,* 816 F.2d 344, 347 (7th Cir. 1987); *Marx v. Government of Guam,* 866 F.2d 294, 296, n. 2 (9th Cir. 1989); *Compania Mexicana de Aviacion v. U.S. District Court,* 859 F.2d 1354, 1358 (9th Cir. 1988).

[8] In the three other FSIA cases to reach this Court, it was the private party that appealed the dismissal of the suit on sovereign immunity grounds. See *Saudi Arabia v. Nelson,* ____ U.S. ____, 113 S.Ct. 1471 (1993); *Argentine Republic v. Amerada Hess,* 488 U.S. 428 (1989); and *Verlinden, B.V. v. Central Bank of Nigeria,* 461 U.S. 480 (1983).

Thus, petitioner's first question presents no issue for review by the Court.

II. The Federal Republic of Germany is Not Subject to Suit under the Implied Waiver Exception to Foreign Sovereign Immunity.

A. The Federal Republic has not waived its immunity under the FSIA.

Petitioner acknowledges, as he must, that none of the express exceptions to foreign sovereign immunity codified in §§ 1605-1607 of the FSIA applies to his claim for compensation for violations of human rights that he suffered at the hands of the Nazi regime half a century ago. The majority's jurisdictional ruling finds ample support in the statute and in its legislative history, and is fully consistent with this Court's repeated interpretations of the statute. In contrast, petitioner urges the Court to embrace the theory that "under limited circumstances" the conduct of a foreign state may be so offensive that it gives rise to an implied waiver of sovereign immunity. (Pet. at 25). Such an exception, petitioner says, should be carved out under §1605(a)(1) only for cases where the victim is a United States national. (*Ibid.*). Petitioner adduces no support for his theory from the language of the statute or its legislative history. He also fails to confront the two decisions of this Court that forbid drawing distinctions between citizens and aliens when determining jurisdiction under the FSIA. *Weltover, supra,* 119 L.Ed. 2d at 408; *Verlinden, supra,* at 589. In exercising such an unprecedented extension of their jurisdiction, United States courts should not, according to petitioner, be concerned with the absence of any other affiliating contacts, with the passage of time, the disappearance of the regime that inflicted the harm, or any other developments on the international scene since the claimant suffered harm. (Pet. *passim*).[9]

Petitioner criticizes the majority of the court of appeals for its claimed "failure to examine and apply the nature of 'comity' to the foreign sovereign immunity determination." (Pet. at 22). He maintains that a state's *jus cogens* violations "are so offensive to the bilateral comity between the nations involved that they give rise *per se* to an implied waiver of the immunity by the offending sovereign." (*Ibid.*) The argument plainly confuses the concept of comity as used in the private international law — the voluntary recognition given by the courts to another state's legislative, executive, or judicial acts — with the international law doctrine of immunity as explicitly codified in the FSIA. It is the explicit provisions of the FSIA that govern here, not the amorphous doctrine of comity. *Amerada Hess, supra,* 488 U.S. at 435-36.

It is remarkable that throughout the FSIA's eight-year gestation period, during which time the proposed legislation underwent innumerable changes as a result of inter-Departmental meetings, discussions with bar associations and learned societies, consultations with the Secretary of State's Advisory Committee on International Law, and two extensive hearings before a sub-committee of the House of Representatives,[10] not a single person adumbrated the possibility that the bill could serve a jurisdictional predicate for actions against foreign states for *jus cogens* violations committed anywhere in the world. To the contrary, "Congress was aware of concern that our courts [might be] turned into small international courts of claims, open to all comers to litigate any dispute which any party may have with a foreign state anywhere in the world." *Verlinden, supra*, 480 U.S. at 490, testimony of Bruno A. Ristau, the Justice Department representative on H.R. 11315 (Hearings on H.R. 11315, at 31); ellipses and internal quotations omitted).

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[9] Petitioner also brings to the Court's attention attempts by the Department of State to persuade the Federal Republic to "settle" this case. Pet. at 7, 20-23. The FSIA, however, was passed to rest the decsion on foreign sovereign immunity squarely in the courts, which are presumed to be impervious to extra-legal considerations. *Verlinden, supra,* at 486-87.

Furthermore, in the 17 years since the inception of the FSIA, not a single unreversed decision has based subject-matter jurisdiction on the theory that a *jus cogens* violation impliedly waived immunity under §1605(a)(1) of the Act. *See also, Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 719 (9th Cir. 1992) (*Amerada Hess* Court foreclosed jus cogens violations as jurisdictional predicate for suits against foreign sovereigns), *cert. denied*, 113 S.Ct. 1812 (1993).

Consistent with the text and legislative history of the FSIA, this Court made it explicit in *Argentine Republic v. Amerada Hess, supra*, that —

> Congress had violations of international law by foreign states in mind when it enacted the FSIA. For example, the FSIA specifically denies foreign states immunity in suits 'in which rights in property taken in

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[10] See, *e.g.* Weber, The Foreign Sovereign Immunities Act of 1976: Its Origin, Meaning and Effect, 3 Yale Studies in World Public Order 1 (1976).

> violation of international law are in issue.' 28 U.S.C. §1605(a)(3). Congress also rested the FSIA in part on its power under Art. I, §8, cl. 10, of the Constitution '[t]o define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations.' See H.R. Rep., at 12; S. Rep., at 12. From Congress' decision to deny immunity to foreign states in the class of cases just mentioned, we draw the plain implication that ***immunity is granted in those cases involving alleged violations of international law that do not come within one of the FSIA's exceptions.***

488 U.S. at 435-36; emphasis added. In context it is clear that the italicized phrase means that immunity is granted in all instances involving alleged violations of international law that are not specifically listed in the Act as instances in which immunity is denied. Otherwise, the violations of international law alleged in *Amerada Hess* could have been sufficient to waive immunity.[11] That is how the phrase was interpreted by the Ninth Circuit in *Siderman, supra*, at 719, and petitioner has cited no decision that interprets the phrase differently.

Based on the foregoing analysis, it is patent that the court of appeals correctly rejected petitioner's argument that tortious conduct of a foreign state abroad which violates *jus cogens norms* of international law is justiciable under the implied waiver provision of the FSIA.

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[11] In *Amerada Hess*, as here, the respondent urged that Argentina's violation of international law had amounted to a blatant violation of international human rights law. Brief for Respondent in No. 87-1372 at 35-36.

B. There has been no waiver under the principles of public international law.

Even if the FSIA left any room for interpretation in this case - which it does not—an exception to the rule of foreign sovereign immunity could not possibly be derived from the principles of public international law. While it is true that Congress directed that the FSIA should be interpreted in accordance with established principles of international law, the conclusions that petitioner has drawn from this position do not bear scrutiny.

Petitioner's arguments misapprehend the underpinnings of the doctrine of sovereign immunity in the contemporary practice of states. While in the past courts and writers have on occasion referred to the "comity of nations" as the basis for granting immunity from suit to foreign states — see, 1 *Oppenheim, International Law* 266-67 (Lauterpacht ed., 8th ed. 1955) — the principle of immunity of sovereign states from the jurisdiction of the courts of other states is now regarded as a positive rule of international law. 1 *Oppenheim's International Law* 341 ff., (Jennings & Watts ed., 9th ed. 1992; H. Steinberger, *State Immunity*, in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Installment 10 (1987) at 432:

> The obligation to grant immunity to foreign States in respect of their conduct or property *jure imperii* today forms part of positive international law, not merely comity, regardless of whether under municipal law immunity is treated as a political question or as a question of law on which the courts may rule.

Petitioner, by various references to the dissenting opinion of the court of appeals (Pet. at 21, 23), also seems to embrace the dissent's assessment of the Nuremberg trial's legal implications. Again only the starting point of the argument is valid. It is correct that the Nuremberg trials have started an evolution of international law that has resulted in definite restrictions on claims to immunity. But Nuremberg, as well as the emerging principle of universal criminal jurisdiction for certain offenses committed by individuals, have only removed the immunity of individual offenders, not of foreign states as such.[12] The dissenting judge's analogy between the Nazi war criminals' legal position before the international forum in Nuremberg and the Federal Republic's standing under international law in a municipal court is false.

Furthermore, petitioner seems to miss one essential aspect of sovereign immunity under international law. Immunity from the jurisdiction of foreign municipal courts does not imply immunity from international responsibility. The Federal Republic has never sought to disavow international responsibility for the Holocaust. As set out in the counterstatement *supra*, over the course of more than forty years, in cooperation with Israel, the United States and the Claims Conference, Germany has devised an elaborate system of compensation—trying to make restitution for the wrongs that cannot be undone.

Petitioner has chosen to dismiss the legal connection between Germany's claim to sovereign immunity in the district court and the established system of world-wide compensation, thus indicating a misunderstanding of the function of sovereign immunity in international law. The singular historic catastrophe of the Holocaust could not conceivably be remedied by countless individual suits under different standards before a multitude of national courts in various countries. Remedial action could only be organized on the international level. This has been done. If, however, national courts now were to begin piercing through the established system of compensation, decades of international efforts would be invalidated. Sovereign immunity thus could not serve any more the vital function it has in the perennial struggle for an orderly conduct of international relations.

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[12] It is worthy of note that the German state itself was not indicted at Nuremberg. Rather, in addition to individuals, six organizations were indicted in the Tribunal: the leadership corps of the Nazi party, the Gestapo and SD, the SS, the SA, the Reich Cabinet, and the German General Staff/High Command. Of these, the four organizations that were creatures of the Nazi party were convicted and the two that were conventional organs of the German state, that is, the General Staff/High Command and the Reich Cabinet, were acquitted. *The Nurnberg Trial*, 6 F.R.D. 69, 131-145 (1946).

Finally, petitioner has wholly failed to take into account the legal fact that the United States Government has not only approved the established system of compensation created by Germany, but has requested its continued application. The United States government has thereby implicitly confirmed Germany's claim of foreign sovereign immunity before U.S. courts with regard to individual suits which clearly run counter to this system. As recently as 1990, the United States, together with the United Kingdom and France, insisted on obtaining in an agreement, binding the United States as well as Germany, the following legal commitment:

> The Government of the Federal Republic of Germany confirms that the deletion of Chapters Three, Four and Five [of the Convention on Relations between the Three Powers and the Federal Republic of Germany of 26 May 1952] *shall not affect the continued application of the principles set forth therein* in respect of internal restitution, compensation for victims of Nazi persecution and external restitution, *as well as the continued application of the corresponding*

> *provisions of the Federal Restitution Law and the Federal Compensation Law.*[13] [R.Add.44a; emphasis added.]

Against this background, the denial of Germany's claim of sovereign immunity in this case would amount to a *venire contra factum proprium*, *i.e.*, the disregard of a well-established principle under international law.

Petitioner's second question, therefore, presents no issue for review by this Court.[14]

III. Petitioner's Third Question Presented Requests an Advisory Opinion that this Court May not Give.

Petitioner finally asks this Court to review the court of appeals' holding that petitioner's forced labor in Poland and Germany half a century ago did not constitute a commercial activity that had a direct effect in the United States. Petitioner urges that the court of appeals thereby decided "a federal question in contravention of an Act of Congress." (Pet. at 26).

Petitioner acknowledges, as he must, that in *Weltover, supra,* this Court determined that the terms "direct effect" as used in Section 1605(a)(2) of the FSIA, means an effect which follows as "an immediate consequence of defendant's activity" rather than one that is "substantial and foreseeable." Pet. at 27-28. He concedes that most courts, including the court below, have interpreted this Court's "immediate consequence" language to mean "one which has no intervening element, but rather flows in a straight line without deviation or interruption.'' *Weltover*, 112 S.Ct. at 2168. (Pet. at 27). Petitioner further asserts that this construction provides scant guidance to the courts, although he provides no authorities or a plausible explanation for that assertion. Instead, he suggests that the term ''direct effect'' has been interpreted by this Court in other statutes in a manner that differs from the meaning given that term by the court below. (Pet. at 28).

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[13] See footnote 4.

[14] Petitioner does not contend in this Court, as he did below, that his claim is cognizable under pre-FSIA law of sovereign immunity — a contention that the court of appeals rejected. (Pet. App. 22a-23a)

Petitioner does not claim that the court of appeals has misinterpreted or misapplied this Court's instructions in *Weltover*, nor does he explain how — on the facts of this case — there could have been a direct effect in the United States in light of the *Weltover* Court's clear analysis.

Article III of the Constitution limits this Court to deciding ''cases or controversies,'' and the Court has long ago established that it does not render mere advisory opinions. *United States v. Fruehauf*, 365 U.S. 146 (1961) (Court declined to give advisory opinion on issues which remain unfocused because not pressed with that clear concreteness provided when question emerges precisely framed and necessary for decision from clash of adversary argument exploring every aspect of multi-faceted situation). Thus, petitioner's third question also presents no issue for review by this Court.

CONCLUSION

The Federal Republic does not deny the Holocaust, nor does it consider that money can ever adequately compensate the victims of the Nazi regime. On the other hand, it should not be necessary to stress that the Federal Republic is not the Nazi regime, and that since its establishment it has undertaken a program for compensation of victims of the Nazi regime that is unprecedented. Like any other country, the Federal Republic has to allocate financial resources among competing needs. It cannot single out Mr. Princz for treatment different from that afforded to individuals who are similarly situated and maintain the integrity of its compensation and restitution program. In any event, a United States court is not competent to review the administration of a compensation program of a foreign state.

For the foregoing reasons, the court of appeals was right in holding that the district court lacked subject matter jurisdiction to hear petitioner's claim under the FSIA, and the petition for a writ of certiorari should be denied.

Respectfully submitted,

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December 19, 1994

Botschaft der Bundesrepublik Deutschland
Embassy of the Federal Republic of Germany

RK 552 SE Princz

Note Verbale No. 42/93

The Embassy of the Federal Republic of Germany presents its compliments to the Department of State and has the honor of bringing to the Department's cognizance the following additional information with respect to the lawsuit of *Princz v. Federal Republic of Germany* which was the subject of the Embassy's Note Verbale No. 22/93 of March 11, 1993.

The office of the Legal Advisor of the Department of State has advised counsel for the Federal Republic of Germany that the United States does not intend to file a Statement of Interest in that litigation.

The denial of sovereign immunity to the Federal Republic of Germany by the U.S. District Court for the District of Columbia in this case is presently under review in the U.S. Court of Appeals for the District of Columbia Circuit. The Embassy is aware that in the past the United States repeatedly expressed its views on foreign sovereign immunity in litigation involving The Peoples Republic of China (1985), Mexico (1987), South Africa (1988), the Soviet Union (1989), Argentina (1989), Iran (1990) and Saudi Arabia (1993).

Since the issue of the fairness and adequacy of the German Laws compensating victims of Nazi persecution has been interjected into these proceedings, the Embassy submits the following history of the German Restitution and Compensation Laws in further clarification of its Note of March 11, 1993.

In the London Proclamation of January 5, 1943, the Allied Powers declared all property transactions in the territory under German control to be null and void. The Protocol of Potsdam of August 2, 1945, provided that "Germany be obliged to make compensation for the damage it caused in kind to the greatest extent possible." From its inception, the issue of reparation, restitution and compensation as a result of World War II was considered an "international question" and not a domestic German question.

The Allied Control Council assumed the functions of the German government after the surrender of the Third Reich. Control Council Proclamation No. 2 announced that the Allies would "protect the rights and interests of those who had suffered under the Nazi injustice."

In March 1949, the U. S. Military Government (OMGUS) issued to the German Council of States (Länderrat), initial guidelines for the promulgation of restitution laws. The individual German States exercised in the early post War years limited authority under the supervision of the occupation authorities. These regional laws provided for the return of property confiscated by the Nazis, so-called "Restitution" (Rückerstattung). Separate "Compensation Laws" (Entschädigungs-Gesetze) were passed to pay for individual damages such as imprisonment in concentration camps, personal injury, wrongful death, impairment of health and loss of future earning capacity. To be eligible, a claimant had to be a resident of the respective State as of January 1, 1947. Refugees as defined by the Geneva Convention were covered by these laws as well as individuals who resided within the boundaries of the German Reich as of December 31, 1937. OMGUS deemed it necessary to impose limitations on eligibility. The early laws became effective on April 1, 1949, for the U.S. occupation zone. Similar laws were issued in the British and French zones. None was enacted in the Soviet zone.

As result of the different laws passed in the three occupation zones for the restitution or property and for compensation of Nazi injustice it became necessary to enact a uniform law for the territory or the Federal Republic. On May 23, 1949 the Federal Republic of Germany regained the power to enact its own laws when it adopted a new Constitution (Grundgesetz). Subsequently, beginning in 1949, the Federal Republic entered into negotiations with the State of Israel and with the Conference on Jewish Material Claims against Germany (Jewish Claims Conference) concerning unresolved issues of compensation for Nazi crimes.

These negotiations culminated in the Treaty with Israel of September 10, 1952, and the so-called Hague Protocols No. 1. and No. 2 which resulted in the payment or three billion Deutschmarks ($ 1,8 billion) to Israel and 450 million Deutschmarks ($ 300 million) to the Jewish Claims Conference. The Federal Republic of Germany and the Jewish Claims Conference dealt as equal partners in these negotiations and continued to do so on subsequent matters.

The first uniform Compensation Law was thereafter enacted on October 1, 1953. It was amended three years later on June 24, 1956, to cover victims who had not been eligible under the residence requirements of the earlier laws. Some 30 organizations representing victims of Nazi crimes testified on June 25, 1963, at a hearing at the German Treasury Department. On September 14, 1965, the Federal Republic of Germany enacted its Final Compensation Law (BEG SchluBgesetz). It further extended the coverage to victims who were not eligible under the earlier residence requirements and dealt with other unresolved issues of compensation for Nazi crimes.

The deadline for filing claims under the 1965 law was repeatedly extended after demands were made by Jewish organizations that individuals outside Germany had not been adequately informed about the provisions of the law. The last and final extension for filing claims was December 31, 1969.

This final deadline was challenged as being unconstitutional. Germany's highest Court upheld the deadline and held that there must come a time when the extent of the German government's responsibility to pay compensation can be finally determined in order to appropriate the necessary funds. By this time more than 25 years had passed since the crimes of the Nazis were committed and it was becoming ever more difficult to establish the evidence necessary to support claims.

Claims were filed with German administrative agencies. Their decisions were subject to challenge in the regular courts: District Court (Landgericht), Court of Appeals (Oberlandesgericht) and Civil Supreme Court (Bundesgerichtshof). In addition the Allied Powers established a Supreme Restitution Court to settle disputes concerning matters of restitution. That Court consisted of two German judges and two judges of each of the Allied powers and continued to be active until the 1980s. In accordance with a decision by the German Civil Supreme Court (BGH) of July 11, 1968, the definition of refugees was further clarified, so as to include claimants who could not return to their home countries because of fear of persecution for racial or political reasons such as in Communist countries. In accordance with the earlier laws originating with U.S. authorities and the negotiations with the Jewish Claims Conference the final compensation law provided that claims would not survive the claimants. Beneficiaries of a descendent's estate would therefore not inherit any interest in the descendent's claim.

Since its inception, the Federal Republic of Germany considered the compensation of the victims of the injustice committed by the Nazi government as one of its most important and urgent tasks. The legislation enacted by the Federal Republic of Germany went beyond the demands established by the victorious Allies and was considered an independent German act of moral responsibility. Chancellor Adenauer spoke of a "debt of honor" of the German people. The law followed the principles expressed in the early laws enacted in the American Zone of occupation.

In addition to the compensation of individual victims who received a total of over 55 billion dollars (85 billions Deutschmarks), the Federal Republic agreed to pay additional billions to foreign governments. The state of Israel received 3.45 billion DM of which 450 million DM was allocated to the Conference on Jewish Material Claims against Germany. During the period of 1959 to 1964 the Federal Republic entered into agreements with 12 Western European countries to pay compensation to Nazi victims who were not covered by the compensation Law of June 29, 1956, because they did not reside within the boundaries of the German Reich as of December 31, 1937. the Federal Republic paid a total of approximately one billion Marks to the following countries: Luxembourg (18 million), Norway (60 million), Denmark (16 million), Greece (115 million) , the Netherlands (125 million), France (400 million), Belgium (80 million), Italy (40 million), Switzerland (10 million) Austria (95 million), Great Britain (11 million) and Sweden (1 million). The equitable distribution of the funds was left to the discretion of the individual countries.

Most recently, the treaties for the unification of Germany included agreements for the compensation of victims who under the prior laws had not received any or not sufficient compensation for their sufferings. On October 28, 1992, the Federal Republic entered into an agreement with the Jewish Claims Conference providing for a fund of over 600 million dollars (975 million DM) to be administered by the Claims

Conference. On October 16, 1991, an agreement was reached with Poland providing for 300 million dollars (500 million DM) for the "Foundation of German-Polish Reconciliation." on April 16, 1992, notes were exchanged with Belarus, the Russian Federation and the Ukraine in which the Federal Republic agreed to provide a total of 600 million dollars (1 billion DM) for "Foundations of Understanding and Reconciliation."

The Embassy of the Federal Republic of Germany avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

Washington, D.C. July, 1993
Ha/Bra

Department of State

Washington, D.C.

United Nations Economic and Social Council

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COMMISSION ON HUMAN RIGHTS

Sub-Commission on Prevention of
Discrimination and Protection
of Minorities
Forty-fifth session
Item 4 of the provisional agenda

REVIEW OF FURTHER DEVELOPMENTS IN FIELDS WITH WHICH THE SUB-COMMISSION HAS BEEN CONCERNED

Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms

Final report submitted by
Mr. Theo van Boven, Special Rapporteur

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VI. NATIONAL LAW AND PRACTICE

106. It has not been possible to collect elaborate information on national law and practice relating to the right to reparation for victims of gross violations of human rights and fundamental freedoms. A request to Governments to supply relevant information provoked only scarce reactions. Consequently, the Special Rapporteur had to rely mainly on information received from other sources[74] and pertaining to a limited number of countries. This section on national law and practice is included for illustrative purposes in order to show how some countries which went through a period of gross violations of human rights have been trying to repair the wrongs of the past and to set norms for the future. While the information reviewed in this section is not complete enough for drawing general conclusions, it does allow the making of certain observations by way of illustration.

107. The most comprehensive and systematic precedent of reparation by a Government to groups of victims for the

redress of wrongs suffered is provided by the Federal Republic of Germany to the victims of Nazi persecution. The early laws enacted in Germany after the Second World War dealt only with restitution of, or compensation for, identifiable property.[75] More far-reaching were the successive Compensation Laws and Agreements, enacted and concluded from the year 1948 and onwards till the enactment in 1965 of the Final Federal Compensation Law (Bundesentschädigungsschlussgesetz, to be referred to as BEG).

108. Under the BEG, a victim of the Nazi persecution is defined as someone who was oppressed because of political opposition to National Socialism, or because of race, religion or ideology, and who suffered in consequence loss of life, damage to limb or health, loss of liberty, property or possessions, or harm to professional or economic prospects.[76] An important aspect of the criteria for eligibility under the BEG is the law's principle of territoriality. A claim for compensation is tied to the claimant's residence in Germany but the law does not only cover residents of the Federal Republic of Germany and former residents of the former territory of Germany as in 1937, but also various categories of refugees, emigrants, deported or expelled people if they had for some time domicile or place of permanent sojourn in Germany.[77]

109. As regards various categories of damage covered by the BEG, the following may be noted:

a) *Loss of life* included, according to the interpretation of the courts, homicide, manslaughter and death as a result of damage to health inflicted on the victim, notably also in concentration camps. Loss of life also included death caused by a deterioration in health resulting from emigration or from living conditions detrimental to health. In addition, compensation has been paid in cases of suicide prompted by persecution, including suicide caused by economic difficulties which the victim could not overcome in the country to which he emigrated;[78]

b) *Damage to limb or health* gave rise to compensation if the damage was more than insignificant which means that it entailed or was likely to entail lasting impairment of the victim's mental or physical faculties;[79]

c) Damage to liberty included deprivation of liberty and restrictions of liberty. Under deprivation of liberty falls police or military detention, arrest by the national Socialist Party, custodial or penal imprisonment, detention in a concentration camp and forced stay in a ghetto. The victim is also regarded as having been deprived of liberty if he lived or did forced labour under conditions resembling detention. Restrictions of liberty giving a claim to compensation included compulsion to wear the Star of David and to live "underground" under conditions unfit for a human being;[80]

d) *Damage to professional and economic prospects* led to compensation if the victim had lost use of his earning power.[81]

110. Many victims of Nazi persecution did not suit the requirements of the BEG. Among these victims were Belgian, Danish, Dutch and French nationals who were persecuted and damaged in their own countries. To meet these claims, a number of countries (Luxembourg, Norway, Denmark, Greece, Netherlands, France, Belgium, Italy, Switzerland, Austria, United Kingdom, Sweden) concluded with the Federal Republic of Germany in the years 1959-1961 with the Federal Republic of Germany "global agreements" under which they received funds for payment to individual claimants.[82] Earlier, in 1952, the Federal Republic of Germany and Israel had concluded an agreement under which the Federal Republic undertook to pay Israel compensation to assist in the integration

of uprooted and destitute refugees from Germany and to pay restitution and indemnification for claims of individuals, Jewish organizations and for the rehabilitation of Jewish victims of the Nazi persecution.[83]

111. While the overall assessment of the BEG is positive (see *infra*, para. 125), the law did have its inadequacies and decisions based on the law showed shortcomings. For instance, many observers maintained that damage to property and possessions received too favourable consideration in comparison with the less generous treatment of damage to life and health. Similarly, the principle of territoriality worked to the disadvantage of victims who were not residents of Germany or who were stateless persons or refugees. On the other hand, one group of victims had been clearly favoured. They were former members of the German civil service or the German Government, including judges, professors and teachers, who were reinstated in the position, salary or pension group which the claimant would have reached had the persecution not taken place.[84] It is against this background that in a set of principles and guidelines for national compensation policies, formulated on the basis of the experience gained by the German *Wiedergutmachung*, the first two principles and guidelines read as follows:

(i) The principle of equality of rights of all victims is of primary importance. This does not mean that they should all receive the same amount of relief, but it does mean that they should enjoy the same rights within the scope of the claims laid down by the law;

(ii) It is necessary to have central planning, legislative, and administrative machinery, since only the principle of centrality can ensure the principle of equality of rights.[85]

* * * * *

125. It should also be recalled that to this date the most comprehensive system of reparation was introduced by the Federal Republic of Germany for compensating victims of Nazi persecution. As was correctly observed more than 20 years ago in an enlightening overview of this important precedent: "... the payments have meant (for numerous victims) the difference between abject poverty and a dignified life with modest security. This does not mean that complete or even genuine restitution has been made. The persecutions by the Nazi regime were unparalleled and unique in their scope and inhumanity. They cannot be atoned and cannot be forgotten. However, from an historical and legal point of view, the compensation programme and reparations constitute a unique operation."[98]

* * * * *

Translation: (BEG v. Sep.1953)

§ 8

(1)Entitlement to Restitution exists when the persecuted

1. on January 1, 1947 had his legal residence or permanent domicile within the jurisdiction of this law;

2. before January 1, 1947 died or emigrated, was deported or expelled, but had his last local residence or permanent domicile within the jurisdiction of this Law;

3. is a war veteran according to the Law on Assistance to War Veterans (Heimkehrergesetz) of June 19, 1950 (Bundesgesetzblatt p. 221) in the version of the Law on Supplement and Amendment to the Law on Assistance to War Veterans of October 30, 1951 (Bundesgesetzbl. I p. 875, 994) took up his residence or permanent domicile in the jurisdiction of this Law.

4. is a displaced person in the sense of §§ 1 and 2 of the Law on Matters of Displaced Persons and Refugees (Bundesvertriebenengesetz) of May 19, 1953 (Bundesgesetzbl. I p. 201) took up residence or permanent domicile within the jurisdiction of this Law;

5. is recognized as a refugee from the Soviet Occupied Zone in the sense of § 3 of the Law on Mat-

ters of Displaced Persons and Refugees of May 19, 1953 (Bundesgesetzbl. I p. 201) and took up residence or permanent domicile within the jurisdiction of this Law;

6. on January 1, 1947 stayed in a camp for Displaced Persons within the jurisdiction of this Law, and

either

after December 31, 1946 emigrated from the jurisdiction of this Law

or

as homeless foreigner entered into the jurisdiction of German authorities, or obtained German citizenship.

(2) the conditions for entitlement per Section 1 do not apply as far as for particular groups of persecuted (§§ 67 to 76) different rules exist. (3) For damages to real property exists entitlement to restitution regardless of residence or permanent domicile of the persecuted, if the real property is located within the jurisdiction of this Law.

THIRD TITLE

Stateless and Refugees in the Sense of the Geneva Convention

§ 160

(1) The persecuted who is at the time of enactment of this Law without nationality or a refugee in the sense of the Geneva Convention of July 28, 1951 and is not being cared for and

supported by any country or inter-governmental organization for any harm suffered or has not received a cash settlement has a claim for compensation for harm to body or health and to freedom.

(2) The persecuted who in the sense of the Geneva Convention is without nationality or a refugee is entitled to a claim according to Section 1, even if he obtained a new citizenship after the end persecution. This does not apply when the persecutee as an Austrian through the unification of Austria with the German Reich obtained German citizenship and became stateless because of the loss of that citizenship.

(3) The survivor of a persecutee who belonged to the group of persons named in Section 1 and 2 is entitled to claim compensation for harm to life. The claim also exists when the survivor belongs to the group of persons named in Section 1 and 2.

(4) As far as claims under §§ 150 to 159 exist, those regulations remain unchanged.

TRANSLATION

United Restitution Organization (URO)
New York Office
50 West 77th Street * New York 24, N,Y,
* Phone:SU 7-7500 Cable:Am.

November 22, 1955
Our Ref. Dep.C—KW/mm

Mr. Hugo PRINCZ
561 Cornell Str. Perth Amboy
New Jersey

Dear Mr. Princz,

I received the file concerning you according to which you give us power of attorney and our visit. Please excuse that at the visit an error occurred in our information department.

Upon examination of your file I note that you were an American citizen at the time of your persecution. For this reason and the further reason that on January 1, 1947 you were not a resident within the territory of the German Reich, you are not entitled to a claim for compensation under the Federal Compensation Law. Therefore, we must decline to represent you.

You are at liberty to withdraw the claim previously filed in Germany. In the event you desire to proceed in this matter, we have to refer you to others for possible representation.

With best regards.

s/ Dr. Kurt Wehle

4645 Reservoir Road, N.W.
Washington, D.C. 20007

RX 321.32
December 8, 1987

K-St

Steven R. Perles, Esq.
Attorney and Counselor at Law
1) Suite 500
1320 - 19th Street, N.W.
Washington, D.C. 20036

Dear Mr. Perles:

I have received the reply of the Federal Foreign Office in Bonn concerning Mr. Hugo Princz's compensation claim.

It is, in fact, not correct that Mr. Princz could not obtain indemnification because he was an American citizen.

The Final Compensation Act of 1965 established a special fund for victims of nazi persecution who had been imprisoned in concentration camps for at least six months, and who under the previous Federal Compensation Act of 1953, were not eligible for compensation.

As Mr. Princz was in concentration camps for about three years, he would have been entitled to a compensation of approximately DM 10,000.——DM 15,000.—, if he had applied before December 31, 1969.

The Federal Foreign Office informs me that this provision of the 1965 Act was announced and widely published in Jewish papers and in publications in the United States so that every interested person had access to that information.

Unfortunately, the time limit for filing such an application expired 18 years ago.

As there had existed a possibility for compensation in the past, the Federal Foreign office was not in a position to include Mr. Princz's case in its proposals to the German Bundestag concerning classes of victims who, for legal or formal reasons, could not obtain compensation.

The Federal Foreign Office suggests that you re-activate Mr. Princz's application for a grant from the hardship fund administered by the Jewish Claim Conference.

It might be helpful to advise the Claims Conference that Mr. Princz, although being a resident of the United States, was not in a position to apply for a grant from the above mentioned special fund under Article V BEG-Schlussgesetz (Final compensation Act), and explain the reasons for which he could not do so.

I am very sorry that I cannot be of immediate help to Mr. Princz, and that the above mentioned provision was not known to me because, at the time it was operative, I had other than legal functions.

Sincerely yours,
gez.

Elfriede G. Krüger
Counselor
and Consul General

PROTOCOL No. 1

Drawn up by Representatives of the Government
of the Federal Republic of Germany and of
the Conference on Jewish Material Claims against Germany

REPRESENTATIVES of the Government of the Federal Republic of Germany and of the Conference on Jewish Material Claims against Germany have met in The Hague to discuss the extension of the legislation existing in the Federal Republic of Germany for the redress of National-Socialist wrongs and have agreed on a number of principles for the improvement of the existing legislation as well as on other measures.

The Government of the Federal Republic of Germany declare that they will take as soon as possible all steps within their constitutional competence to ensure the carrying out of the following programme:

1. COMPENSATION

1. The Government of the Federal Republic of Germany is resolved to supplement and amend the existing compensation legislation by a Federal Supplementing and Co-ordinating Law (*Bundesergänzungs-und-Rahmengesetz*) so as to ensure that the legal position of the persecutees throughout the Federal territory be no less favourable than under the General Claims Law now in force in the US Zone. Insofar as legislation now in force in the Länder contains more favourable regulations these will be maintained.

The provisions contained hereinafter shall apply throughout the whole territory of the Federal Republic.

2. Jurisdictional gaps resulting from the residence and dateline requirements of the compensation laws of the various Länder will be eliminated. A change in residence from one *Land* to

another shall not deprive anyone of compensation.

3. Where residence and dateline requirements are applicable under compensation legislation, compensation payments for deprivation of liberty shall be granted to persons who emigrated before the dateline and had their last German domicile or residence within the Federal territory.

4. Persecutees who were subjected to compulsory labour and lived under conditions similar to incarceration shall be treated as if they had been deprived of liberty by reason of persecution.

5. A persecutee who, within the boundaries of the German Reich as of December 31, 1937, lived "underground" under conditions similar to incarceration or unworthy of human beings shall be treated as if he had been deprived of liberty by reason of persecution, in the meaning of that term under compensation legislation.

6. Where a persecutee died after May 8, 1945, his near heirs (children, spouse or parents) shall be entitled to assert his claim for compensation for deprivation of liberty, if this appears equitable by reason of the connection between the persecutee's death and persecution or of the indigence of the claimant. This provision shall not apply if the deceased was at fault in failing to file his claim in time.

7. Where the computation of annuities payable to persecutees is or will be based on the amounts of pensions payable to comparable categories of officials, all past and future changes in the pensions payable to comparable categories of officials will also be applied as from the effective date of the future Federal Supplementing and Co-ordinating Law, to the annuities payable to persecutees. If at that time the persecutee has received no such annuities, such changes shall be effective as of April 1, 1952.

8. The future Federal Supplementing and Co-ordinating Law in supplementing the present legislation will grant to members of the free professions, including self-employed persons in trade and industry, agriculture, and forestry, the choice between a capital payment and annuities as compensation for loss of opportunities to earn a livelihood (Existenzschüden). The capital payment shall be granted up to a ceiling of DM 25.000 in each case as compensation for the damage suffered before the former vocation was fully resumed. Instead of the capital payment the persecutee may elect an appropriate annuity corresponding to his former living standards. The annuity shall, however, not exceed DM 500 per month. The persecutees shall be entitled to such choice only if at the time the choice is made, he is unable to or cannot be reasonably expected to fully resume his former vocation. The choice shall be final. If the beneficiary elects annuities, payments will be computed as from the day one year prior to the date of election.

9. The Government of the Federal Republic of Germany will provide compensation to persons who suffered losses as officials or employees of Jewish communities or public institutions within the boundaries of the German Reich as of December 31, 1937.

Insofar as these persons have a claim against public authorities for compensation under existing or future compensation legislation, they will receive temporary relief pending the beginning of these compensation payments. If the persons involved do not have such claims, their maintenance will be secured by monthly payment based on their former salaries.

10. The future Federal Supplementing and Co-ordinating Law shall, in providing compensation for damage to economic prospects, include in an appropriate manner for compensation for damage to and vocational and professional training.

11. Persecutees who have their domicile or permanent residence abroad shall be compensated for deprivation of benefits accruing to victims of the First World War if they were deprived of such benefits by the National-Socialist regime of terror because of their political convictions, race, faith or ideology.

12. Persons who were persecuted because of their political convictions, race, faith or ideology and who settled in the Federal Republic or emigrated abroad from expulsion areas within the meaning of that term in the "Equalization of Burden" law shall receive compensation for deprivation of liberty and damage to health and limb, in accordance with the provisions of the General Claims Law of the US Zone. This applies only if they settled in the Federal Republic or emigrated abroad before the general expulsions took place and if it may be assumed that the persecutee would have been subjected to the expulsion measures taken against nationals and ethnic Germans in connection with the events of the Second World War. Survivors of such persecutees shall receive annuities if all other conditions prescribed in the General Claims Law of the US Zone for the grant of survivors' annuities are fulfilled.

Such persecutees shall receive compensation for special levies, including the Reich Flight Tax, which were imposed upon them as a result of acts of terror of the regime, either by law or arbitrarily. Such special levies shall be taken into account up to a ceiling of RM 150.000 in each individual case. The claim shall be converted at the rate of DM6.5 for RM 100, in the same way as savings accounts of expellees from the East are being converted.

For damage to economic prospects compensation shall be paid insofar as such damage made it impossible for the persecutee to provide for old-age maintenance, wholly or in part, our of his own resources. In such the damage will be determined, taken into account aslo up to a ceiling of RM150.000 in each case, and converted at the rate of DM6.5 for FM 100.

If the claimant is age or permanently incapable of earning a livelihood because of illness or physical disability and the compensation paid to him for personal damages and for special levies, together with his own property and his other income, is insufficient to provide for his livelihood he may elect, instead of a capital payment for damage to his economic prospects, a requisite annuity.

Compensation in accordance with Paragraph I Aa also be paid to persecutees who emigrated abroad or settled in the Federal Republic during or after the time the general expulsions took place.

13. The residence and date-line requirements of the General Claims Law of the US Zone shall not be applied to persecutees who suffered damage under the National-Socialist regime of terror and who, as political refugees from the Soviet Zone of occupation, moved into the Federal Republic and legally established their permanent residence there (so-called ''double-persecutees'').

14. Persons who were persecuted for their political convictions, race, faith or ideology during the National-Socialist regime of terror and who are at present stateless or political refugees and who were deprived of liberty by National-Socialist terror acts shall receive appropriate compensation for deprivation of liberty and damage to health and limb, in accordance with the basic principles of the General Claims Law of the US Zone and in line with (in Anlehnung an) the compensation payments established therein, i.e. as a rule, not less than¾ of those rates. This does not apply, however, if the persecutee's needs are or were provided for by a State or an international organization on a permanent basis or by way of a capital payment because of the damage suffered from per-

secution. Persecutees who acquired a new nationality after the end of persecution shall be assimilated to stateless persons and political refugees.

Survivors of such persecutees shall receive corresponding annuities if all other conditions established in the General Claims Law of the US Zone for the grant of survivors' annuities are fulfilled. If the compensation granted to the claimant, together with his own property and other income, is insufficient to provide for his livelihood he shall, in recognition of the persecution, be granted a corresponding equalization payment out of the Hardship Fund referred to elsewhere which is to be established by the Government of the Federal Republic of Germany.

The provisions contained here shall not be applicable insofar as a persecutee is covered by the provisions of 12 above.

15. The Government of the Federal Republic of Germany will endeavour to carry out the whole compensation programme as soon as possible but no later than within ten years. They will see to it that the necessary funds shall be made available, as from the financial year 1953-54. The funds to be made available for any specific financial year shall be fixed in accordance with the Federal Republic's capacity to pay.

16. The Federal Supplementing and Coordinating Law shall, in recognition of general social principles, provide that claims of persons entitled to compensation who are over 60 years of age, or who are needy, or whose earning ability has been considerable impaired because of illness or physical disability shall be accorded priority over all other claims, both in adjudication and payment. Full compensation for deprivation of liberty and for damage to life and limb shall in these cases be payable at once. Property damage and loss of opportunities to earn a livelihood insofar as they are compensated by capital

payment shall be payable at once up to an amount of DM5.000 in each case. Insofar as payments are granted to such beneficiaries by way of annuities full payment shall begin at once.

17. The Government of the Federal Republic of Germany will see to it that, taking into account the principles contained in 15 above, funds shall be provided in such amounts, during the first financial years, that not only the claims referred to in 16 above can be satisfied, but in addition, claims of other beneficiaries can also be appropriately dealt with.

18. No distinction shall be made concerning the treatment of claimants living within and those living outside of the territory of the Federal Republic insofar as compensation is concerned.

19. Where evidence is required equitable consideration shall be given to the probative difficulties resulting from persecution. This shall apply particularly to the loss or destruction of files and documents, and to the death or disappearance of witnesses. The compensation authorities shall *ex officio* make the investigations to establish the relevant facts and seek appropriate evidence. The special conditions affecting the persecutees shall be taken into due consideration in interpreting the terms "domicile" ("rechtmässiger Wohnsitz") or " 'residence" ("gewöhnlicher Aufenhalt").

20. A principle corresponding to the legal presumption of death contained in the restitution laws of the US and British Zones shall be inserted in the Federal Supplementing and Coordinating Law. This presumption of death shall also be applicable in the procedure before the Probate Courts dealing with the issuance of a certificate of inheritance (*Erbschein*), provided that the validity of the certificate of inheritance be restricted to the compensation procedure.

II. RESTITUTION

1. The legislation now in force in the territory of the Federal Republic of Germany concerning restitution of identifiable property to victims of National-Socialist persecution shall remain in force without any restrictions, unless otherwise provided in Chapter Three of the *Convention on the Settlement of Matters Arising out of the War and the Occupation*.

2. The Federal Government will see to it that the Federal Republic of Germany accepts liability also for the confiscation of household effects in transit (*Umzugsgut*) which were seized by the German Reich in European ports outside of the Federal Republic, insofar as the household effects belonged to persecutees who emigrated from the territory of the Federal Republic.

3. The Government of the Federal Republic of Germany will see to it that payments shall be ensured to restitutees—private persons and successor organizations appointed pursuant to law—of all judgements or awards which have been or hereafter shall be given or made against the former German Reich under restitution legislation. The same shall apply to amicable settlements. Judgments or awards based on indebtness in RM of the former Reich for a sum of money (*Geldsummenansprüche*) shall be converted into DM at the rate of ten RM for one DM. Judgments or awards for compensation for damage (*Schadenersatz*) shall be made in DM and in accordance with the general principles of German Law applicable to the ment of compensation for damage.

In accordance with Article 4, paragraph 3 of Chapter Three of the Convention on the Settlement of Matters Arising out of the War and the Occupation, the obligation of the Federal Republic of Germany shall be considered to have been satisfied when the judgements and awards shall have been paid or when the Federal Republic of Germany shall have paid a total of DM 1.500 million. Payments on the basis of amicable settlement shall be included in this sum. The time and method of payment of such judgments and awards shall be included in accordance with the Federal Republic capacity to pay. The Government of the Federal Republic of Germany will, however, endeavour to complete these payments within a period of ten years. In settling the liabilities of the German Reich the claimants in the French Zone shall not be treated less favorably than those in other parts of the Federal territory.

4. Monetary restitution claims against the German Reich up to an amount of DM5.000 in each case, as well as claims of beneficiaries who are over 60 years of age, or are needy or whose earning ability has been considerably impaired because of illness or physical disability shall be accorded priority over all other monetary restitution claims against the German Reich, both in adjudication and payment.

6. In equalizing the burdens arising from the war ("Lastenausgleich") the position of persons entitled to restitution is given special considerations as concerns the taxon property. Reference is made to the particulars contained in the provisions of the Law on the Equalization of Burdens of August 14, 1952 (BGBI. LS. 446).

7. It is the intention of the Government of the Federal Republic of Germany in implementing the principle of law contained in Article 359, paragraph 2 of the Law on the Equalization of Burdens to brig about the following:

a) Compensation in accordance with the principles of the Equalization of Burdens Law shall be provided for damage to and losses of such material assets as are described in Section 12 paragraph 1, subparagraphs 1 and 2 thereof if the persecuted suffered these losses as a result of confiscation as defined in the restitution legislation, and in the expulsion areas within the meaning of that term in the Equalization of Burdens of Law. This applies, however, only if the losses occurred before the general expulsions took place and if it may be assumed that the persecutee would have been subjected to the expulsion measures taken against German nationals and ethnic Germans in connection with the events of the Second World War.

b) In implementing the principle of law referred to above, the provision of the Equalization of Burdens Law requiring that the persecutees had his permanent residence in the Federal Republic or in West Berlin on December 31, 1950, shall not apply.

c) The indemnification of persecutees from expulsion areas whose permanent residence is outside the boundaries of the former German Reich will be taken over only in part. This part shall be determined by taking into account the distribution of expellees between the Federal Republic and the Soviet Zone of occupation.

d) In cases where household effects in transit belonging to such persecutees were confiscated in European ports outside of the Federal Republic these confiscations shall be treated as confiscation within the meaning of paragraph a) above.

IN WITNESS WHEREOF the Chancellor and Minster for Foreign Affairs of the Federal Republic of Germany, of the one part, and the Representative of the Conference on Jewish Material Claims against Germany, duly authorized thereto, of the other part, have signed this Protocol. DONE at Luxembourg this 10th day of September 1952, in the English and German languages, each in two copies, the text in both languages being equally authentic.

For the Government of the Federal Republic
of Germany
(Sgd.) Adenauer
For the Conference on Jewish Material Claims
against Germany
(Sgd.) Goldmann

PROTOCOL No. 2

Drawn up by the Representatives of the Government of the Federal Republic of Germany and of the Conference on Jewish Material Claims against Germany consisting of the following Organizations:
Agudath Israel World Organization
Alliancek Israelite Universelle
American Jewish Committee
American Jewish Congress
American Jewish Joint Distribution Committee
American Zionist Council
Anglo-Jewish Association
B'Nai Brith
Board of Deputies of British Jews
British Section, World Jewish Congress
Canadian Jewish Congress
Central British Fund
Conseil Representatif des Juif de France
Council for the Protection of the Rights and Interests ofJews from Germany
Delegacion de Asociaciones Israelitas Argentinas J(D.A.I.A.)
Executive Council of Australian Jewry
Jewish Agency for Palestine
Jewish labor Committee
Jewish War Veterans of the U.S.A.
South African Jewish Board of Deputies
Synagogue Council of America
World Jewish Congress
Zentralrat der Juden in Deutschland

The Government of the Federal Republic of Germany, of the one part, and the Conference on Jewish Material Claims against Germany, of the other part, WHEREAS

The National Socialist regime of terror confiscated vast amounts of property and other assets from Jews in Germany and in territories formerly under German rule;

AND WHEREAS

Part of the material losses suffered by the persecutees of National-Socialism is being made good by means of international German legislation in the fields of restitution and indemnification and whereas an extension of this internal German legislation, in particular in the field of indemnification, is intended;

AND WHEREAS

Considerable values, such as those spoliated in the occupied territories, cannot be returned, and that indemnification for many economic losses which have been suffered cannot be made because, as a result of the policy of extermination pursued by National-Socialism, claimants are no longer in existence;

AND WHEREAS

A considerable number of Jewish persecutees of National-Socialism are needy as a result of their persecution;

AND HAVING REGARD

To the statement made by the Federal Chancellor, Dr. Konrad Adenauer, in the Bundestag on September 27, 1951, and unanimously approved by that body;

AND HAVING REGARD

To the Agreement this day concluded between the State of Israel and the Federal Republic of Germany;

AND HAVING REGARD

To the fact that duly authorized representatives of the Government of the Federal Republic of Germany and of the Conference on Jewish Material Claims against Germany have met at The Hague;

Have therefore this day concluded the following Agreement:

Article 1

In view of the considerations hereinbefore recited the Government of the Federal Republic of Germany hereby undertakes the obligation towards the Conference on Jewish Material Claims against Germany to enter, in the Agreement with the State of Israel, into a contractual undertaking to pay the sum of 450 million Deutsche Mark to the State of Israel for the benefit of the Conference on Jewish Material Claims against Germany.

Article 2

The Federal Republic of Germany will discharge their obligation undertaken for the benefit of the Conference on Jewish Material Claims against Germany in the Agreement between the Federal Republic of Germany and the State of Israel by payments made to the State of Israel in accordance with Article 3 paragraph (c) of the said agreement. The amounts so paid and transmitted by the State of Israel to the Conference on Jewish Material Claims against Germany will be used for the relief, rehabilitation and resettlement of Jewish victims of National Socialist persecution, according to the urgency of their needs as determined by the Conference on Jewish Material Claims against Germany. Such amounts will, in principle, be used for the benefit of victims who at the time of the conclusion of the present Agreement were living outside of Israel.

Once a year the Conference on Jewish Material Claims against Germany will inform the Government of the Federal Republic of Germany of the amounts transmitted by Israel, of the amounts expended as well as of the manner in which such expenditure has been incurred. If, for any adequate reasons, the Conference on Jewish Material Claims against Germany has not spent the moneys it has received, it shall inform the Government of the Federal Republic of Germany of the said reason or reasons.

The information herein referred to shall be supplied within one year from the end of the calendar year in which the relevant amount had to be transmitted to the Conference in pursuance of Article 3 paragraph (c) of the Agreement between the State of Israel and the Federal Republic of Germany.

The Conference on Jewish Material Claims against Germany undertakes to spend, not later than three months before the penultimate instalment payable to Israel falls due, all moneys referred to in Article 3 paragraph (c) of the Agreement between the State of Israel and the Federal Republic of Germany and which have been received seven months prior to the date on which the said penultimate instalment becomes due as aforesaid, and to inform the Government of the Federal Republic of Germany accordingly.

Article 3

The Conference on Jewish Material Claims against Germany shall be entitled, after prior notification to the Government of the Federal Republic of Germany, to assign its rights and obligations derived from the provisions of this Protocol and of the Agreement between the Federal Republic of Germany and the State of Israel to one or several Jewish organizations which are qualified to assume such rights and obligations.

Article 4

Disputes arising out of the interpretation and the application of Articles 2 and 3 of this Protocol shall be decided, in accordance with the provisions of Article 15 of the Agreement between the State of Israel and the Federal Republic of Germany, by the Arbitral Commission established by virtue of Article 14 of the said Agreement.

IN WITNESS WHEREOF the Chancellor and Minister for Foreign Affairs of the Federal Republic of Germany, of the one part, and the representative of the Conference on Jewish Material Claims against Germany, duly authorized thereto, of the other part, have signed this Protocol.

Done at Luxembourg this tenth day of September 1952, in the English and German languages, each in two copies the text in both languages being equally authentic.

For the Government of the Federal Republic of Germany signed: Adenauer

For the Conference on Jewish Material Claims against Germany signed: Nahum Goldmann

Der Bundesminister der Finanzen 53117 Bonn

Mr. Lloyd Bentsen Secretary of the Treasury
15th Street
Pennsylvania Avenue, N.W.
Washington, D.C. 20220

U. S. A.

12 November 1994

Dear Colleague:

At a meeting last April on the occasion of the IMF / World Bank spring meeting you raised the case of Hugo Princz, who filed a claim for compensation before a U.S. court in the amount of US $ 17 million against the Federal Republic of Germany. First of all, I should like to emphasize that the German Government deeply regrets the injustice that Mr. Princz has had to suffer.

We are all aware of the fact that no compensation in whatever form can make undone the terrible suffering of Holocaust victims. Yet, the Federal Republic of Germany has done everything possible to compensate the survivors of the Holocaust at least financially. Within the limits imposed by law, Mr. Princz has the same rights as any other Nazi victim who filed a claim under German law to receive compensation for suffering under Nazi persecution. His American citizenship does not prevent him from filing such a claim since the relevant law was amended in 1965 to the effect that Mr. Princz and other similarly affected foreign nationals became entitled to claim compensation. Despite the fact that this amendment was widely publicised in the American media, Mr. Princz did not file a claim before the final deadline of 31 December 1969.

Following German unification the German government provided a further $ 690 million in 1992 after negotiations with the Jewish Claims Conference to grant assistance to Nazi victims such as Mr. Princz who had not received any compensation for various reasons (e.g. failure to observe the time limit). Up until today, Mr. Princz has refused to file a claim with the Jewish Claims Conference.

The Jewish Claims Conference has granted monthly pensions in the amount of $ 330 (at current exchange rates) to close on 4,000 victims living in the U.S.A. They also received a lump-sum payment to tide them over until the payment of the pension started. More pension commitments are expected to be made in a large number of cases.

For reasons of fairness, the Federal Republic of Germany deems it appropriate that in view of the large number of entitled persons and the limited resources available similar cases should be treated equitably on the basis of existing laws and agreements. To abandon this principle in one individual case would unravel the entire German system of compensation which was developed in close consultation with your administration.

If Mr. Princz's claim were granted, even to a small extent, this might result in additional demands from all over the world totalling many billions of dollars, in view of the large number of Holocaust survivors; this would quite substantially restrict the financial scope available to the Federal Republic of Germany for pursuing future-oriented policies. In addition considering the massive financial endeavours the Federal Republic of Germany has now been undertaking for more than years to compensate Nazi victims, there would be no way in which this could be rendered acceptable to the German public.

Against this background, the German government is deeply concerned about the intention of the US Congress to amend with retroactive effect the Foreign Sovereign Immunities Act (FSIA) with explicit reference to the Federal Republic of Germany in the context of the Hugo Princz case, thus creating a "lex Germany".

On the last day of its session, the House of Representatives adopted amendment H.R. 934 of the Foreign Sovereign Immunities Act (FSIA) entitled "An act to amend title 28, United States Code". This amendment envisages that the Federal Republic of Germany would no longer be able to invoke sovereign immunity in those cases where citizens of the United States became victims of acts of genocide during World War II. Unfortunately, it is to be feared that the Senate might adopt this amendment at its meeting on 30 November 1994.

Such an act would be without precedent in international law. It is expressly and solely directed against the Federal Republic of Germany and would thus single out in an inacceptable manner an important ally and partner. I am greatly concerned that such an act might severely impair German-American relations, which have so far been built on mutual trust and deep friendship. The response of the German public would be disbelief and deep disappointment.

The proposed amendment aims to terminate the operation of a compensation system which was developed to ensure an equitable distribution of available resources to the great number of victims, in particular victims of Jewish faith, and has involved considerable financial payments by the Federal Republic of Germany; this system has gained world-wide acknowledgement over decades.

Under the current system, the Federal Republic of Germany has provided compensation in the volume of $ 74.3 billion; a further $ 10 to 12 billion will be paid out as pensions over the coming years. A large share of these pensions is paid to approximately 40,000 entitled victims living in the U.S.A.

If the amendment should enter into force, these payments based on German law and international agreement with, for instance, the State of Israel and the Jewish Claims Conference, would be subject to a full-scale legal review and possible modification by U.S. courts. In this context I should like to point out that the United States itself agreed to the German principles underlying compensation stipulated in the 1952 Convention on the Settlement of Matters Arising out of the War and the Occupation. In the exchange of letters of 27./28. September 1990 relating to that convention the principles established in the 1952 convention relating to the compensation of victims of Nazi persecution and the relevant provisions of the German compensation laws were reiterated at the express wish of the United States.

I am certain that you wish, as I do, to avoid a profound and lasting strain on the relations between our two countries. I would therefore urgently request you to use your influence to prevent adoption of the amendment to the Foreign Sovereign Immunities Act in Congress, which constitutes a marked and unwarranted discrimination against Germany.

Yours sincerely,

sgd.
(Dr. Theo Waigel)

TRANSLATION

Consulate General
of the Federal Republik
of Germany

460 Park Ave.
New York, N.Y. 10022

File NR.:RK 552 WG Princz

Mr. Hugo Princz
312 Harrison Avenue
Highland Park, N.J. 08904

April 10, 1991

Dear Mr. Princz,

thank you for your letter of March 11, 1991 asking to be compensated for the injustice inflicted upon you by the Nazis in concentration camps. I have been requested to answer your letter in my capacity as head of the Legal and Consular Section of the German General Consulate New York.

Please excuse that the answer was somewhat delayed. The reason is that I had to obtain the file in this matter from the German Embassy in Washington, DC.

After extensive study of all the documents available and after consultation with experts on the restitution laws I must advise you that German authorities can not make any payments in your case. As has been previously explained to you, you failed to make your claim prior to December 31,1969 the final date under the Federal Restitution Law. As you also know, victims who have missed without their fault the mentioned filing date, can receive payments from the Jewish Claims Conference from a special fund provided by the German Federal Parliament. The Jewish Claims Conference has received the sum of 1,2 billion marks for this purpose. In accordance with the wish of the German legislature, it is the Jewish Claims Conference alone which decides whether payments should be made In cases where claims were filed late. Therefore, I have no choice, but to again direct you to their address. I see no possibility for the "settlement" you are suggesting.

You Indicated that you plan to bring this matter to the attention of the American public; before doing so, I would like to remind you that the U.S. State Department via its embassy in Bonn has already intervened on your behalf with the German Foreign Office. The Foreign Office has at that time explained the law to the American Embassy. There is nothing I can add to this presentation.

With kind regards,

s/ Volker Klein

FRANCE-FEDERAL REPUBLIC OF GERMANY-UNITED KINGDOM-UNITED STATES
EXCHANGE OF NOTES CONCERNING THE RELATIONS CONVENTION AND THE SETTLEMENT CONVENTION*

[Done at Bonn, September 28, 1990]

Cite as 30 I.L.M. 454 (1991)

Embassy of the United States of America

September 28, 1990

His Excellency
Dr. Hans Werner Lautenschlager,
State Secretary,
Ministry of Foreign Affairs,
Federal Republic of Germany.

Excellency,

I have the honor to acknowledge receipt of your Note of September 27, 1990 concerning the Relations Convention and the Settlement Convention, the English text of which reads as follows:

> "I have the honour to refer to the discussions which have taken place between representatives of the Federal Republic of Germany, the French Republic, the United Kingdom of Great Britain and Northern Ireland and the United States of America, and, on behalf of the Government of the Federal Republic of Germany to propose the following:

"1. The Convention on Relations between the Three Powers and the Federal Republic of Germany of 26 May 1952 (as amended by Schedule I to the Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany, signed at Paris on 23 October 1954) ("The Relations Convention") shall be suspended upon the suspension of the operation of quadripartite rights and responsibilities with respect to Berlin and to Germany as a whole, and shall terminate upon the entry into force of the Treaty on the Final Settlement with respect to Germany, signed at Moscow on 12 September 1990.

"2. Subject to paragraph 3 below, the Convention on the Settlement of Matters Arising out of the War and the Occupation of 26 May 1952 (as amended by Schedule IV to the Protocol on the termination of the Occupation Regime in the Federal Republic of Germany, signed at Paris on 23 October 1954) ("the Settlement Convention) shall be suspended and shall terminate at the same time as the Relations Convention; this also applies to the letters and exchanges of letters relating to the Relations Convention and the Settlement Convention."

"3. The following provisions of the Settlement Convention shall, however, remain in force:

Chapter One: Article 1, paragraph 1, first sentence up to and including "...legislation enacted by the Occupation Authorities", and paragraphs 3, 4, and 5

Article 2, paragraph 1

Article 3, paragraphs 2 and 3

Article 5, paragraphs 1 and 3

Article 7, paragraph 1

Article 8

Chapter Three: Article 3, paragraph 5(a) of the Annex
Article 6, paragraph 3 of the Annex

Chapter Six: Article 3, paragraphs 1 and 3

Chapter Seven: Article 1

Article 2

Chapter Nine: Article 1

Chapter Ten: Article 4

In addition, paragraph 7 of the letters of 23 October 1954 from the Federal Chancellor to each of the three High Commissioners relating to facilities for Embassies and Consulates, as well as the letters of 23 october 1954 in confirmation from the High Commissioners, shall remain in force.

"4. (a) The Government of the Federal Republic of Germany declares that it shall take all adequate measures to ensure that the provisions of the Settlement Convention which remain in force shall not be circumvented in the territory of the present German Democratic Republic and in Berlin.

(b) With regard to Article 11 of Chapter One of the Settlement Convention:

The Government of the Federal Republic of Germany is aware of the continued existence of I.G. Farbenindustrie A.G.I.L. under the original name and shall use its best endeavours to achieve a satisfactory solution consistent with the objectives which were expressed in Article 11 of Chapter One.

(c) With regard to Chapters Three, Four and Five of the Settlement Convention:

The Government of the Federal Republic of Germany confirms that the deletion of Chapters Three, Four and Five shall not affect the continued application of the principles set forth therein in respect of internal restitution, compensation for victims of Nazi persecution and external restitution, as well as the continued application of the corresponding provisions of the Federal Restitution Law and the Federal Compensation Law. The compensation pensions awarded to the victims of Nazi persecution and to their descendants shall continue to be granted in accordance with the applicable provisions.

The Government of the Federal Republic of Germany shall ensure that upon suspension of the Settlement Convention the jurisdiction of the Supreme Restitution Court is transferred to German courts.

The Government of the Federal Republic of Germany states that the Federal Restitution Law and the Federal Compensation Law will be extended to the territory of the present German Democratic Republic.

In this respect further provisions that take account of the conditions prevailing there are required.

(d) With regard to Chapter Nine of the Settlement Convention:

Articles 2 and 3 of Chapter Nine have not been retained on the assumption that all questions dealt with therein have been settled as far as the Parties to the Settlement Convention are concerned.

The Government of the Federal Republic of Germany has assumed the responsibility for the determination and satisfaction of any claims by persons subject to its jurisdiction which are referred to in Article 3 and which may still be asserted under German law.

"If the Governments of the French Republic, the United Kingdom of Great Britain and Northern Ireland and the United States of America agree to the content of this Note, this Note and the Notes in reply thereto expressing your Governments' agreement, shall constitute an Agreement between our four Governments, which shall enter into force upon receipt of the last reply expressing agreement. The Government of the Federal Republic of Germany shall inform the other Governments of the receipt of that last reply.

"The English and French texts of this Note are attached hereto, all three texts being equally authentic."

I have the honor to inform you that the Government of the United States of America agrees to the content of Your Excellency's Note. Accordingly, Your Excellency's Note, this reply and the replies of the Ambassador of the French Republic and the Ambassador of the United Kingdom of Great Britain and Northern Ireland expressing their Governments' agreement shall constitute an Agreement between our Governments, which shall enter into force upon receipt of the last reply expressing agreement.

Accept, Excellency, the renewed assurances of my highest consideration.

Translation

AGREEMENT
BETWEEN THE FEDERAL REPUBLIC OF GERMANY AND THE GERMAN DEMOCRATIC REPUBLIC TO IMPLEMENT AND INTERPRET THE AGREEMENT SIGNED IN BERLIN ON AUGUST 31,1990 BETWEEN THE FEDERAL REPUBLIC OF GERMANY AND THE GERMAN DEMOCRATIC REPUBLIC TO ACCOMPLISH THE UNIFICATION OF GERMANY
-UNIFICATION TREATY-

Article 2

The contracting parties express their intention to see to it that the Resolution of the Peoples Chamber of the German Democratic Republic of April 14, 1990 for a just compensation of the material losses of victims of the Nazi regime is implemented. The Government of the Federal Republic of Germany is prepared to continue its policy to pursue an agreement to establish an additional fund for hardship payments to persecutees who have so far not received any or only minor compensation in accordance with the laws of the Federal Republic of Germany.

Bonn, October 3rd 1980
VI A 6—0 1470D - 249/80

VI A 4 - 0 1470 (CC) - 34/92 October 9th, 1992

Agreement

between

the Federal Minister of Finance

and

the Conference on Jewish Material Claims against Germany (referred heronto as Claims Conference)

according to

article 2 of the agreement of September 18th, 1990 concerning the achievement of the unification of Germany between the Federal Republic of Germany and the German Democratic Republic to execute and interpret the Unification Treaty, executed In Berlin August 31st, 1990

concerning

an additional fund solution for granting benefits in cases of severity to traced persons according to the definition of § 1 Federal Compensation Act, who until now have obtained no or little compensations according to the laws of the Federal Republic of Germany.

I. Financial aids paid once

The Payment of financial aids to be granted once shall be continued according to the provisions of the guidelines of the Federal Government concerning the granting of benefits to traced Jewish persons to give compensation in single cases of severity within making amends of October 3rd, 1980 (Federal Register No. 192 of October 14th, 1980).

For that purpose Claims Conference shall receive in total up to DM 200 million until 1999.

The proposed distribution of means within the years 1993—1999 can be seen in the appendix, which is a part of this agreement.

II. Current financial aids

1. Persons provably having been arrested at least for 6 months in a concentration camp according to the definition of §§ 31 Sec. 2, 42 Sec. 2 Federal Compensation Act or having suffered from 18 months of ghetto imprisonment or had to hide living in a situation that violates basic human fights or elsewhere similar to the forementioned may obtain current financial aids up to DM 500 per month, as far as they suffered from a severe health damage because of the treatment and are in a special situation of emergency and fullfill the requirements of § 2 of the October 3rd 1980 guidelines.

Current financial aids will be granted for the space of time the recipient stays in a situation of emergency.

Payments In advance up to an amount of DM 5000 do not prevent from receiving current aids. As far as compensations for imprisonment have been granted, even those payments exceeding the amount of DM 5000 do not prevent from receiving current aids.

Payment of current financial aids will start August 1st, 1995.

Within the space between January 1st, 1993 and August 1st, 1995 Claims Conference will grant single payments up to DM 10000 for each case according to the provisions made in the appendix hereunder to those persons fulfilling the requirements of Nos. II 1 and II 2 herein. For that reason an amount up to DM 217 million shall be granted.

Payments already granted by the Claims Conference within the years 1993, 1994 and 1905 have to be set off to single payments.

To traced persons filing an application according to this agreement later than December 31st 1994 no single payments shall be granted.

III
Institutions

An amount up to DM 33 million in total shall be granted for the maintenance of institutions for senior Jewish traced persons according to the appendix hereunder. Aids can be granted to investments serving the improvement of the institutions or of care possibilities for the patients. Rendering the money requests the foregoing filing of an investment plan with the Federal Minister of Finance in cooperation with the certain institution.

IV
Additional Agreements

1. Aids must be refused or refunded under the provisions of §§ 6 or 7 Federal Compensation Act

2. There is no entitlement to benefits according to this agreement. Benefits hereunder are personal and therefore neither transferable nor hereditary. Single payments already fixed according to II.4 herein can be transferred to surviving spouse or children.

3. Obtained interests must be used within the provisions of Nos. 1, II.1 and II.4 herein. The prove of use has to be given according to No. IV.5 herein.

4. Necessary costs for administration will be taken over by the Federal Republic as long as this agreement is valid.

In addition to the means for administration costs provided in the Raising Up the Means Agreement of January 24th, 1991 further means up to an amount of DM 750000 will be granted to the Claims Conference for the current fiscal year.

For the fiscal years 1993 until 1995 DM an amount up to 6 million will be granted for administration costs each year. Beginning with fiscal year 1996 up to DM 4.5 million will be granted.

Concerning the necessity of giving an evidence of means' use it is referred to No. IV.5 herein.

5. Claims Conference will give an evidence of means' use each 6 months, starting up with the coming into effect of this agreement.

Claims Conference will provide a nomination of all grantees to the Federal Minister of Finance at the end of each month, scheduling who receives benefits paid once, single financial aids or current financial aids. The schedule of granted financial aids has to contain information about residence state, sex, group of age, date of emigration, country where tracing measures took place and character of tracing measure.

Concerning the agreement expired December 31st, 1992, Claims Conference has to deliver a final report until June 30, 1993 scheduling financial in- and outputs, interest earnings, administration costs as well as number of positive decisions, negative decisions on applications over all and the means still left within the provisions of that agreement.

6. Claims Conference has to hand over an evidence of means' use to the Federal Minister of Finance concerning benefits within the provisions of No. III herein for each fiscal year expired, at least until March 31st of the following fiscal year.

7. In 1993, 1994 and 1995, payments from the Federal Minister of Finance to Claims Conference according to No. II herein will be made upon its request one month after each passing of Federal budget and can be made within the amounts scheduled in the budget for that fiscal year.

Concerning requests according to Nos. I, II.1 and IV.4 herein Claims Conference has to prove its need for the next half of the year taking Into consideration Interests and administration costs. The Federal Minister of Finance may grant an amount different from the requested one.

8. The means listed In the appendix hereunder have to be regarded as conditional to the budgetary allowance of the parliament.

9. The Bundesrechnungshof anytime may request informations about the use of means. It also has the competence to conduct controls concerning the use of means is according to the agreements stated herein with any institution or any person which or who received benefits provided under this agreement.

10. As far as annual means being listed in the appendix hereunder will not be needed for purposes stated in Nos. I, II.1 and II.4, they may be used for other purposes forementioned herein as long as payments do not exceed the over all amount granted for that year. In those cases the Federal Minister of Finance has to be informed in advance.

11. The Federal Minister of Finance agrees to earlier consultations with the Claims Conference in 1994 concerning the development of applications by numbers and conclusions could to be drawn of this development.

12. This agreement will come into effect at January 1st, 1993 after having been executed by the Federal Minister of Finance and the Claims Conference.

The agreement between the Federal Minister of Finance and the Claims Conference of January 1st, 1991 will expire the same date. Means having been ordered, but not yet spent by the Claims Conference (according to the former agreement), including interest earnings deriving from former grants, are to be granted according to this agreement.

This has no impact on the agreement of No. IV.4 herein concerning the granting of additional means for administration costs in the amount up to DM 750000 within the fiscal year 1992.

EMBASSY
OF THE
FEDERAL REPUBLIC OF GERMANY
WASHINGTON, D.C.

NOTE VERBALE No. 124/94

The Embassy of the Federal Republic of Germany presents its compliments to the Department of State and has the honor to transmit the following.

According to the enclosed copy of the letter from the Administrator of the Article 2 Fund of the Jewish Claims Conference sent to the German Ministry of Finance, Mr. Princz would be eligible to receive monthly payments and, should he file an application by December 31, 1994, a one-time payment from the said fund as well.

A copy of the enclosed letter, along with the cover letter from our attorney, has also been mailed to the legal counsel of Mr. Princz.

The Embassy of the Federal Republic of Germany avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

Washington, D.C., November 23, 1994

The United States
Department of State
Washington, D.C.

CLAIMS CONFERENCE ARTICLE 2 FUND

15 EAST STREET • SUITE 906 • NEW YORK, NY 10010
TEL. (212) 213-4034

November 9, 1994

Dr. Jürgen Quantz
Ministerialdirector
Bundesfinanzministerium
Ellerstrasse 50-54
53119 Bonn, Germany

Dear Dr. Quantz:

In reply to your inquiry, please be advised that should Mr. Hugo Princz file a claim with the Article 2 Fund, and the generally available information is confirmed, he would be eligible to receive monthly payments of DM 500 effective August 1, 1995.

Should he file an application by December 31, 1994, he would additionally be eligible to receive a one-time payment of DM 5000.

Sincerely yours,

Saul Kagan
Administrator
Article 2 Fund

SX/fr

LAW OFFICES
BERLINER, CORCORAN & ROWE
1101 SEVENTEENTH STREET, N.W.
SUITE 1004
WASHINGTON, D.C. 20036-4798
(202) 293-55555

November 23, 1994

BY FAX AND REGULAR MAIL

Steven R. Perles, Esquire
1754 Kenyon Street, N.W.
Washington, D. C. 20010

Re: Hugh Princz v. Federal Republic of Germany

Dear Mr. Perles:

Enclosed is a copy of a letter, dated November 9, 1994, signed by Saul Kagan, administrator of the Claims Conference Article 2 Fund, addressed to Dr. Quantz of the German Ministry of Finance in Bonn. The Article 2 Fund is the fund administered by the Conference on Jewish Material claims against Germany which was established in 1992 pursuant to an agreement between Germany and the Conference to compensate survivors of Nazi persecution who have not yet received compensation.

I am sending you this letter to make you aware that Mr. Princz should be eligible to receive compensation like the 70,000 persons who have applied for payments from this fund so far.

As you will note from this letter, Mr. Princz would also be eligible to receive a one-time payment of DM 5000 (approximately $3,400.00) if he files an application by December 31, 1994.

Sincerely,

Peter Heidenberger

Enclosure

TRANSCRIPT OF DECEMBER 11, 1992 HEARING

MR. HEIDENBERGER: May I briefly respond?

THE COURT: Yes, you certainly may. You certainly may.

MR. HEIDENBERGER: Your Honor, I want to say I feel just as much pain as anybody else who is listening to —

THE COURT: Can I tell you something?

MR. HEIDENBERGER: Yes, Your Honor.

THE COURT: Unless some Supreme Court tells me I'm wrong, you're in this case. I've never seen anything so outrageous in my life. The Government of Germany can't give this man a pension? And I think this Court has been misled. I think you've misled this Court. And if that is still going to be the position taken by the German Government, that's outrageous. He's one of two survivors. He had no right to get a pension, and you now told this Court he had a right and he slept on his rights.

MR. HEIDENBERGER: Your Honor, may I respond?

THE COURT: This man didn't sleep on any rights.

MR. HEIDENBERGER: May I respond, Your Honor?

THE COURT: You certainly may.

MR. HEIDENBERGER: I have handled many American claimants for restitution who have received restitution. There are two cases who failed to file in time.

THE COURT: He didn't fail to do anything. He didn't fail to do anything. And if this government can't — if your government can't take care of a situation like this where a family was destroyed, where you took an American citizen and you put him in a place not fit for animals, it's outrageous. Outrageous to come into this Court with this business don't have jurisdiction. We got jurisdiction. He's an American citizen and he's going to sue in this Court. And if you don't like it, fine. You go to another Court. But this Court is going to hold this in. And whatever his damages are, he's going to get it. And I think it's up to your government to do something in this case. He was an American citizen, and I'm not saying it was all right to do it to anybody else, but to do this to an American citizen because he happens to be a Jew is outrageous.

MR. HEIDENBERGER: It's not my government, Your Honor.

THE COURT: Well, whose government is it?

MR. HEIDENBERGER: I'm an American citizen, Your Honor.

THE COURT: Well, the government you represent.

MR. HEIDENBERGER: And I'm doing a job to find out what the law here is and for Your Honor, frankly, I would like to have a record of this, and the question is —

THE COURT: You can have a record, and I want this record. If you want it, get it on the front page of the Washington Post or anywhere else you want to print it. But these people who have lived through this and seen their parents killed, their brothers killed, it's outrageous, and nobody wants to do anything for these people. It's ridiculous.

MR. HEIDENBERGER: The Germans spent billions, billions of dollars to compensate.

THE COURT: Billions of dollars, but they wouldn't give this man $500 a month, a pittance. What they did, they robbed him. Where did you ever think of taking an American citizen and throwing them in a concentration camp?

MR. HEIDENBERGER: I don't know anything about the facts, Your Honor.

THE COURT: Well, you should learn it. Learn about the facts. I learned it.

MR. HEIDENBERGER: The plaintiff himself —

THE COURT: Unless that man has misrepresented to me, learn the facts. This is history that is beyond belief. And what pains more than anything else to think they took an American citizen, an American citizen. What animals do we have here?

MR. HEIDENBERGER: I have no problem — I fully agree, Your Honor.

THE COURT: And yet this government will not make any amends, will not take — he's one of two people in the whole country, and if this man cannot bring a case in this country. When he went over there, he went over there on the basis that case, Judge Easterbrook in the Apostol case addressed this issue specifically in the context of an appeal from a denial of a motion for immunity, and he said, obviously it makes no sense that a case go to trial while the Court of Appeals is deciding whether a case should go to trial, and that's what this is about.

THE COURT: Well, can't you get a stay from them? Isn't that the way to proceed? Isn't that the orderly way to proceed is get a stay?

MR. CORCORAN: Our understanding is the orderly way to proceed was that there was an automatic stay, and that's what Judge Easterbrook says. There is an automatic stay. I don't know any of these cases that have gone forward.

THE COURT: Well, until you get a stay, we're going forward. All right?

MR. CORCORAN: All right. Then let me make another argument which is not addressed in our opposition, and that is I don't know what — I mean, Your Honor is taking the view the FSIA doesn't apply to this case.

THE COURT: Doesn't apply to the extent that it's being used to deny these people the right to proceed here in this Court, that you can't have a government that has denied an individual his basic rights to then use — go into that government's Courts and say use the law against that individual. That to me is so basic that I don't know what else I can tell you. I've said it 52 times. It seems to me that this gentleman has the right as an American citizen to come into this Court to be able to sue a government that has treated him as poorly as this man has been treated and his family has been treated. Now, what is so different? This is a sui generis case.

MR. CORCORAN: I don't think so, Your Honor. I think this is a case —

THE COURT: You don't think this is sui generis?

MR. CORCORAN: No.

THE COURT: All right.

MR. CORCORAN: These similar facts have been addressed by the Supreme Court specifically, and I'd like to read you some language from the latest Supreme Court opinion. I have to get it.

THE COURT: I don't need to be lectured. I understand. I read the latest subpoena, but the point that you're raising is something that is beyond my understanding. You don't think that this case is different than that case? You don't see the distinction?

MR. CORCORAN: Between the —

THE COURT: Between the government that has killed six million Jews and —

MR. CORCORAN: It's not the same government, Your Honor. We're 50 years down the pike. You can't treat the Federal Republic of Germany like it was Nazi Germany. It isn't Nazi Germany.

THE COURT: Well, the point is that there are certain — nobody is trying to treat the Federal Government of Germany as Nazi Germany, except by the actions that are being taken by your government. And the actions that have been taken by your government have got to be dealt with in the way that they are taken.

MR. CORCORAN: They have to be dealt with —

THE COURT: We're told here that this case is jurisdictional.

MR. CORCORAN: It is.

THE COURT: That's not the issue of this case.

MR. CORCORAN: This is an Article III Court. It must always examine its subject matter jurisdiction. The Supreme Court says that again and again and again.

THE COURT: If you think that this case is about jurisdiction, then you don't understand this case. This case has nothing to do with jurisdiction.

MR. CORCORAN: A Court has to have jurisdiction. I'm not saying that there shouldn't be a remedy for Mr. Princz, simply that it is not in this Court.

THE COURT: When you say the issue in this case is jurisdiction, I ask you several questions. Every time that Mr. Princz has tried to get the German Government to listen to

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(3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

HUGO PRINCZ,
Petitioner,
v.
THE FEDERAL REPUBLIC OF GERMANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, THE INTERNATIONAL ASSOCIATION OF JEWISH LAWYERS AND JURISTS (AMERICAN SECTION) AND THE NATIONAL JEWISH COMMUNITY RELATIONS ADVISORY COUNCIL AS AMICI CURIAE IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

The Anti-Defamation League of B'nai B'rith ("ADL"),[1] The International Association of Jewish Lawyers and Jurists (American Section) ("IAJLJ"),[2] and The National Jewish Community Relations Advisory Council ("NJCRAC")[3] (collectively "the Amici"), by their undersigned counsel, respectfully move for leave to file the attached brief as amici curiae in support of the Petition for Writ of Certiorari. The Amici have requested and obtained the written consent to file this brief from Petitioner, Hugo Princz. Consent from The Federal Republic of Germany, Respondent, was requested but refused.[4] Correspondence documenting the respective positions of the parties has been filed with the Clerk.

The Petition seeks review of the decision of the United States Court of Appeals for the District of Columbia Circuit that the district court lacked subject matter jurisdiction in this case pursuant to the Foreign Sovereign Immunities Act of 1976 ("FSIA").[5]

The subject of this litigation involves the most heinous acts of discrimination, barbarism, degradation, and mass murder of Jews ever committed—the Holocaust. Moreover, the case concerns the enslavement and barbaric treatment of a Jewish *American* by the German government during World War II.

---

[1] ADL is a private not-for-profit corporation, incorporated in the District of Columbia. Its address is 823 United Nations Plaza, New York, NY 10017.

[2] IAJLJ is a private not-for profit corporation, incorporated in the District of Columbia. Its address is P.O. Box 65269, Washington DC 20035.

[3] NJCRAC is a private not-for-profit corporation, incorporated in New York. Its address is 433 Park Avenue South, New York, NY 10016.

[4] Respondent previously consented to ADL and IAJLJ jointly filing a brief amici curiae when this case was before the United States Court of Appeals for the District of Columbia Circuit. ADL and IAJLJ are baffled as to why Respondent would now reverse its position entirely and deny consent here. Perhaps Respondent will file an objection to this motion stating its reasons for denying consent.

[5] 28 U.S.C. §§ 1330, 1391(f), 1602-1611.

As national humanitarian organizations, the Amici share a common interest in protecting the human rights of all persons, and in particular, individuals who are in the religious or ethnic minority. This case raises, for the organized Jewish community, two issues that are central to its consciousness, and to the Amici's collective mission: the Holocaust and the protection of the rights of individuals, in this case an American who was enslaved by a foreign government and who seeks redress in our courts. The interests and activities of the Amici enable them to provide this Court with an important perspective that extends beyond that of the parties, and to address more broadly the far-reaching implications that the appellate court's ruling may have on the rights of all Americans.

Specifically, the Amici have a substantial interest in this litigation for several reasons.

First, since its founding in 1913, ADL has endeavored to advance goodwill and mutual understanding among all Americans, to combat prejudice and to secure human rights for all individuals. ADL desires to participate in this case particularly in furtherance of its charter mandate "to secure justice and fair treatment of all citizens alike and to put an end forever to unjust and unfair discrimination against and ridicule of any sect or body of citizens." The events giving rise to this lawsuit, and the salient legal issues, fall squarely within the defined interests of ADL.

IAJLJ is a membership organization consisting of attorneys and judges in more than 32 countries around the world. Its founder was retired Justice Haim Cohn of the Supreme Court of Israel, and its Honorary President, until his death, was former Justice Arthur J. Goldberg. IAJLJ's American Section was organized in 1983 by members of the American Jewish legal community to defend Jewish interests and human rights in the United States and abroad. In fulfillment of its mission, IAJLJ works to safeguard the civil and human rights of Jews, minority groups and victims of oppression everywhere; sponsors educational programs on topical legal issues; promotes the study of Jewish law and ethics through law school courses, seminars, and publications; and uses its official international status as a United Nations Nongovernmental Organization to provide diplomatic and legal assistance to Jews around the world.

IAJLJ's interest in this case is to provide the Court with a full and clear picture of the events and conditions giving rise to Mr. Princz's claims, and to demonstrate that the courts of the United States indeed have the power to adjudicate his claims against The Federal Republic of Germany. Among IAJLJ's concerns has been the identification and legal prosecution of those who participated in the genocide of the Jewish people during World War II.

NJCRAC is the national planning and coordinating body for Jewish community relations and public policy in the United States. As an umbrella organization, NJCRAC comprises thirteen national agencies and 117 community organizations, representing approximately 200 local communities throughout the United States. NJCRAC's national member organizations include: American Jewish Committee, American Jewish Congress, Anti-Defamation League, B'nai B'rith, Hadassah, Jewish Labor Committee, Jewish War Veterans of the U.S.A., National Council of Jewish Women, Union of American Hebrew Congregations, Union of Orthodox Jewish Congregations of America, United Synagogue of Conservative Judaism, Women's League for Conservative Judaism, and Women's American ORT.

NJCRAC's mandate, since its founding in 1944, has been to work to secure the civil rights and civil liberties of all Americans, particularly those who are members of minority and religious groups, and not exclusively Jewish Americans. NJCRAC has filed and participated in numerous amicus briefs in a broad range of civil liberties and civil rights cases.

Second, ADL and IAJLJ have been involved in this litigation since mid-1993. ADL and IAJLJ (along with other interested individuals) filed a brief amici curiae in this case when it was before the United States Court of Appeals for the District of Columbia Circuit. *Princz v. Federal Republic of Germany*, 26 F.3d 1166 (D.C. Cir. 1994).

Third, the Amici are experienced in and have been committed to furthering their interests by filing amicus briefs in other cases that have dealt with issues similar to those raised in this litigation. For example, ADL filed a brief on the merits in *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1812 (1993). IAJLJ filed an amicus brief in *Demjanjuk v. Petrovsky*, 10 F.3d 338 (6th Cir. 1993) (amicus brief in support of motion for rehearing en banc), *cert denied*, *Rison v. Demjanjuk*, 115 S. Ct. 295 (1994), which similarly dealt with German atrocities committed in the Holocaust.

The Amici are very familiar with the questions involved in this litigation and have reason to believe that one significant legal question may not be fully addressed by Petitioner. Additional briefing would assist this Court in determining whether Germany has waived implicitly whatever sovereign immunity it might otherwise have had by committing actions so lawless against an American, that the conduct: (1) violated the most fundamental and universally accepted norms of international law known as *jus cogens*; and (2) was the basis for international criminal prosecutions of German government officials.[6] Accordingly, the Amici wish to argue that the "implied waiver" provision of the FSIA (28 U.S.C. § 1605(a)(1)) confers subject matter jurisdiction in this case.

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[6] **In convening a tribunal at Nuremberg in the mid-1940's to punish German government officials as war criminals, the executive branch of our government confirmed that Germany waived its sovereign immunity by committing these atrocious acts. The Amici wish to highlight the significance of the Nuremberg prosecutions in the context of the "implied waiver" argument, and in so doing, to demonstrate that under these circumstances, the courts of this nation are not closed to an American citizen who has been lawlessly victimized by a foreign state.**

The FSIA's implied waiver provision evidences a Congressional intent to ensure that the courts of this country remain open to Americans who have been victimized by a foreign state in violation of the most basic elements of international law. Given the frequency with which Americans travel abroad, and the instability of foreign governments, the scope of the legal safeguards against brutal victimization by foreign states is clearly an issue of enormous national importance.

The Amici have a longstanding commitment to safeguarding the civil rights of all Americans, and have an abiding interest in the welfare of all Jewish Americans, including Hugo Princz. For these reasons, and those set forth in the attached brief, the Amici respectfully request leave to file a brief amici curiae.

Respectfully submitted,

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December 19, 1994

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QUESTION PRESENTED

Whether The Federal Republic of Germany waived its sovereign immunity by implication under section 1605(a)(1) of the Foreign Sovereign Immunities Act of 1976 by committing against an American actions so lawless that the conduct: (1) violated the most fundamental and universally accepted norms of international law; and (2) was the basis for the criminal prosecution and execution of German government officials as war criminals by an international tribunal comprising the United States and other nations?

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

No. 94-909

HUGO PRINCZ,
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v.
THE FEDERAL REPUBLIC OF GERMANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, THE INTERNATIONAL ASSOCIATION OF JEWISH LAWYERS AND JURISTS (AMERICAN SECTION) AND THE NATIONAL JEWISH COMMUNITY RELATIONS ADVISORY COUNCIL AS AMICI CURIAE IN SUPPORT OF PETITIONER

The Anti-Defamation League of B'nai B'rith ("ADL"), The International Association of Jewish Lawyers and Jurists (American Section) ("IAJLJ"), and The National Jewish Community Relations Advisory Council ("NJCRAC") (collectively, "the Amici"), respectfully submit this brief amici curiae contingent upon the granting of the accompanying motion for leave. The brief supports the Petition for a Writ of Certiorari filed in this case by Petitioner, Hugo Princz, and urges reversal of the appellate court's decision below.

INTEREST OF THE AMICI CURIAE

As more fully described in the accompanying Motion for Leave to File Brief Amici Curiae, the Amici have a substantial interest in this litigation.

Each of the Amici has endeavored to advance goodwill and mutual understanding among all Americans, to combat prejudice, and to secure human rights for all individuals. Although deeply committed to fighting against the defamation of Jews, the mission of each of the Amici is broader and secular. In this case, the Amici wish to vindicate the rights of all Americans who unfortunately may become the prey of an outlaw foreign nation.

The subject of this litigation involves heinous acts committed by a foreign government against the Jewish people —the Holocaust. Moreover, the case concerns the official, government sanctioned enslavement and barbaric treatment of a Jewish *American* by the German government during World War II. The ultimate question presented, when simplified to its essence is: do the courts of the United States have the power to adjudicate civil claims asserted by an American citizen against an outlaw foreign state that enslaved and tortured him, and killed millions of other people solely because of their religion or ethnicity, all clearly in violation of the most fundamental and universally recognized norms of international law known as *jus cogens*?

The Amici's interest in this case is to support Mr. Princz's petition. The Amici's interest is also to demonstrate that when a foreign state commits actions against an American that are so lawless as to violate fundamental and universally accepted norms of international law, the courts of the United States indeed have jurisdiction to hear civil claims arising from such actions, and the Foreign Sovereign Immunities Act of 1976 (the "FSIA") does not immunize the foreign state from suit.

ADL and IAJLJ argued below, and all of the Amici wish to argue in this Court, that the "implied waiver" provision of the FSIA (28 U.S.C. § 1605(a)(1)) confers subject matter jurisdiction upon a federal district court in this case. The Federal Republic of Germany waived implicitly whatever sovereign immunity it might otherwise have had under the FSIA by violating the *jus cogens* norms of the law of nations. When a foreign state violates these fundamental requirements of a civilized world, it thereby waives its right to be treated as a sovereign. These issues were addressed at length in both the opinion of the appellate court filed by Circuit Judge Douglas Ginsburg and in the dissenting opinion filed by Circuit Judge Patricia Wald. Indeed, Judge Wald's dissenting opinion largely accepted the arguments and theories advanced by ADL and IAJLJ concerning an implied waiver under § 1605(a)(1).

The Amici have a demonstrated interest in this case, and believe strongly that this Court should grant the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

The Amici adopt the Statement in the Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

There are several reasons why this Court should grant the Petition for Writ of Certiorari. These reasons, taken together, demonstrate that this case is of great national significance, weighing heavily in favor of review.

I. BECAUSE DECISIONS INTERPRETING THE FOREIGN SOVEREIGN IMMUNITIES ACT CAN HAVE A SERIOUS IMPACT ON U.S. RELATIONS WITH FOREIGN STATES, REVIEW BY THIS COURT IS PARTICULARLY APPROPRIATE.

The manner in which the federal courts interpret and implement the FSIA can impact relations between the United States and foreign states. Apparently for this reason, this Court has on several occasions rendered decisions interpreting provisions of the FSIA. For example, in *Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S. 480, 486 (1983), this Court stated that sovereign immunity exists as "a matter of grace and comity on the part of the United States, and [is] not a restriction imposed by the Constitution." More recently, this Court confirmed in *Argentine Republic v. Amerada Hess Shipping Corp.,* 488 U.S. 428, 434 n.1. (1989) that sovereign immunity has never been a right held by a foreign state, but instead is a privilege "granted" by the United States to foreign states. As such, this Court has been careful to clarify problems arising in defining the precise scope of this statutory grant of foreign sovereign immunity. *See Republic of Argentina v. Weltover, Inc.,* 112 S.Ct. 2160 (1992); *Saudi Arabia v. Nelson,* 113 S.Ct. 1471 (1993).

Congress enacted a comprehensive scheme for *judicial* determinations of questions of foreign sovereign immunity. This Court is the proper body to interpret the FSIA definitively in this important case that can affect relations between our government and a foreign state.

II. THIS COURT SHOULD ENUNCIATE A LEGAL STANDARD APPLICABLE TO "NON-TRANSACTIONAL" WAIVERS UNDER THE FSIA.

As a general rule, a foreign state is entitled to immunity under the FSIA unless an exception thereunder applies. One such exception is when "the foreign state has waived its immunity either explicitly or by implication". 28 U.S.C. § 1605(a)(1). To date, federal court decisions interpreting this provision have been restricted to situations where the foreign state allegedly waived immunity by implication in a negotiated contract,[1] in the course of a lawsuit,[2] or by some other act directly implicating the United States courts[3] (collectively referred to herein as "transactional waivers"). The instant case, however, presents this Court with an opportunity to advise the lower courts as to how to interpret the FSIA waiver provision in cases involving what might be characterized as a "*non-transactional*" implied waiver—cases where the implicit waiver arises from the unlawful conduct that gives rise to the claim itself, and not from some transaction capable of signalling the foreign state's willingness to be sued in U.S. courts.

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[1] *See, e.g., Eckert Int'l Inc. v. Government of the Sovereign Demographic Republic of Fiji*, 32 F.3d 77 (4th Cir. 1994) (government of Fiji implicitly waived sovereign immunity by entering into a contract containing a choice of law provision requiring the agreement to be construed and interpreted according to Virginia law); *Joseph v. Office of Consulate Gen. of Nigeria*, 830 F.2d 1018 (9th Cir. 1987), *cert. denied*, 485 U.S. 905 (1988) (implied waiver premised on agreement by parties that U.S. Courts may be involved in disputes arising pursuant to the contract, regardless of whether that contract explicitly identified the governing law).

[2] *See, e.g., Drexel Burnham Lambert Group, Inc. v. Committee of Receivers for Galadari*, 12 F.3d 317 (2d Cir. 1993), *cert. denied*, 114 S.Ct. 1644 (1994) (no waiver of immunity by affirmatively answering complaint); *Rodriguez v. Transnave Inc.*, 8 F.3d 284 (5th Cir. 1993) (participation in litigation, two year delay in urging motion to dismiss on grounds of sovereign immunity, and removal by foreign sovereign did not constitute waiver of sovereign immunity); *Foremost-McKesson Inc. v. Islamic Republic of Iran*, 905 F.2d 438 (D.C. Cir. 1990) (no waiver of immunity when sovereign did not respond substantively to any averments or pose any defenses to claims, but argued merely for change of forum); *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370 (7th Cir. 1985) (USSR did not waive its immunity by failing to defend the action because there was no conscious decision to take part in the action nor a failure to raise sovereign immunity despite the opportunity to do so).

[3] *See, e.g., Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1812 (1993).

The appellate court below, relying in part on several transactional waiver cases, held very broadly that "an implied waiver depends upon the foreign government having at some point indicated its amenability to suit." *Princz v. Federal Republic of Germany,* 26 F.3d 1166, 1174 (D.C. Cir. 1994) *reprinted in* the Petition for Writ of Certiorari, Appendix C (*Pet. Cert. App. C*) page 3a, 19a. The appellate court went on to state that "Mr. Princz does not maintain, however, that either the present government of Germany or the predecessor government of the Third Reich *actually indicated, even implicitly, a willingness to waive immunity* for actions arising out of the Nazi atrocities." *Id.; Pet. Cert. App. C* at 19a (emphasis added). The court characterized this standard as "the intentionality requirement implicit in § 1605(a)(1)". *Id.; Pet. Cert. App. C* at 19a.

There are no reported cases that address directly whether *jus cogens* violations can constitute an implied waiver under § 1605(a)(1) of the FSIA. This Court in *Amerada Hess* found no waiver of sovereign immunity under § 1605(a)(1) where the foreign state defendant had signed an international agreement "that contains no mention of a waiver of immunity to suit in United States courts or even the availability of a cause of action in the United States." 488 U.S. at 442-43. Like all of the other "transactional" waiver cases, the waiver in *Amerada Hess* was not based on the conduct giving rise to the cause of action. *Amerada Hess* also did not involve violations of the peremptory norms of international law.

This Court in *Amerada Hess* apparently endorsed the view that a foreign state may still be entitled to sovereign immunity, even where the state has violated international law. In *Amerada Hess* the violation involved one nation's wartime bombing of a neutral commercial oil tanker. As offensive as this conduct may have been, the violation of international law was not of the compelling *jus cogens* variety. Unfortunately, as *Amerada Hess* suggests, there are many lawless acts that a foreign state, particularly in wartime, can commit with immunity from later civil litigation in our courts.

The horrific conduct that Mr. Princz alleges here, however, is completely outside that protection and continues at least one narrow category of conduct that can never be carried out with impunity against an American. *Amerada Hess* did not deal with state-sponsored genocide, slavery and religious persecution. Nor did the United States have a substantial interest in adjudicating that case, which involved claims by a foreign corporation against another foreign state. This Court did not consider (and our research has failed to locate a case where it has considered) whether *jus cogens* violations committed against an American citizen could constitute an implied waiver under § 1605(a)(1) of the FSIA.

The appellate court in this case, apparently lacking a suitable alternative to the standards enunciated in the transactional waiver cases, evaluated this non-transactional waiver case using the same standards by which it would have evaluated a transactional waiver. Appropriate judicial standards do exist, however, for the evaluation of such an implicit waiver, and the "intentionality requirement" apparently derived in the transactional waiver cases is simply inapposite.

There is nothing in the FSIA's legislative history indicating that Congress intended to confer immunity on flagrant violators of fundamental norms of international law known as *jus cogens,* unless the outlaw foreign nation actually evinced its amenability to the civil jurisdiction of our courts, particularly where the victim is an American. Rather, Congress intended that "claims by foreign states to sovereign immunity are best made by the judiciary on the basis of a statutory regime *which incorporates standards recognized under international law.*" H.R. Rep. No. 1487, 94th Cong., 2d Sess. 12, 14, *reprinted in* 1976 U.S.C.C.A.N. (90 Stat. 2891) 6604, 6613 (emphasis added). The appellate court's extraordinarily narrow interpretation of the FSIA's implied waiver provision runs counter to the longstanding cannon of statutory construction that "an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains." *Murray v. The Charming Betsy,* 6 U.S. (2 Cranch) 64, 118 (1804). While the appellate court's construction of § 1605(a)(1) does not *per se* violate international law, it is clearly inconsistent with it because the court granted an immunity that the international community as a whole has denied.

This Court should interpret the FSIA in such a way as to harmonize it with international law. The dissent below clearly and correctly stated:

> The only way to reconcile the FSIA's presumption of foreign sovereign immunity with international law is to interpret § 1605(a)(1) of the Act as encompassing the principle that a foreign state implicitly waives its right to sovereign immunity in United States courts by violating *jus cogens* norms.

Princz, 26 F.3d at 1183; *Pet. Cert. App. C* at 39a.

III. THE APPELLATE COURT'S INTERPRETATION OF THE FSIA AFFECTS MORE THAN THE LITIGANTS, AND MAY AFFECT AMERICANS WHO TRAVEL ABROAD.

The appellate court's decision affects the rights of any American who may fall victim to uncivilized acts of barbarism committed by a foreign state abroad. Under the appellate court's decision, absent some "intentional" waiver by the foreign state, our courts are automatically closed to an American who seeks civil remedies under those circumstances. Given the frequency with which Americans travel abroad, and are therefore at risk of being injured by the actions of a foreign state, the appellate court's narrow reading of the implied waiver provision unnecessarily removes a possible deterrent to the type of barbaric acts to which Mr. Princz was subjected. Reversal of the appellate court's decision (and adoption instead of the dissent's reasoned interpretation of the FSIA) would serve to protect Americans abroad. A reversal would inform the international community that in the United States courts, there are real consequences for the most serious violations of international law where the victim is an American. The protection of Americans abroad is a matter of enormous national importance, and militates in favor of review here.

IV. A REVERSAL WOULD BE CONSISTENT WITH THE ACTION OF OUR EXECUTIVE BRANCH AT NUREMBERG.

Review and reversal by this Court would furnish an interpretation of the FSIA's implied waiver provision that is consistent with the prior actions and the express wishes of our executive branch. At the close of World War II, and immediately following Germany's unconditional surrender, our executive branch and the governments of our allies brought German officials to justice for precisely the same offenses that gave rise to Mr. Princz's claims here. The United States and its allies convened, on German soil, an international judicial tribunal for this purpose. The Nuremberg Charter and the subsequent trial and execution of major German war criminals confirmed that, as far as our executive branch was concerned, German officials could not assert the sovereign immunity of the German state to shield themselves from prosecution for crimes of war and crimes against humanity. The Nuremberg tribunal's decision[4] expressly rejected the defense of immunity raised by the German officials and government organizations.

The rationale behind *The Nuremberg Decision* was simple and compelling—he who commits heinous international crimes, even when doing so pursuant to the authority and orders of the state, is not shielded from liability *if the state, in authorizing the action, has violated the most fundamental norms of international law.* The defendants at Nuremberg were not immune from suit because Germany was not immune from suit. *The Nuremberg Decision* is consistent with the traditional basis for sovereign immunity recognized by our courts—namely that sovereign immunity is viewed as a privilege, and reserved on the grounds of grace and comity, *only* for nations that respect basic and universally recognized dictates of international conduct. *See Victory Transp., Inc. v. Comisaria General de Abastecimientos y Transportes,* 336 F.2d 354 (2d Cir. 1964), *cert. denied,* 381 U.S. 934 (1965).

Because Germany engaged in lawless and inhumane conduct far beyond that which might have been permissible even for a nation at war, *The Nuremberg Decision* rendered Germany *hostis humani generis,* " an enemy of all mankind." Because of this conduct itself—which included slavery, torture, religious persecution and genocide —Germany was held to have forfeited whatever sovereign immunity it might otherwise have had for those specific acts committed in that time.

Similarly, the FSIA's implied waiver provision appears to be "based upon the general presumption that states abide by international law and, hence, violations of international law are not 'sovereign' acts." *Cf. West v. Multibanco Comermex, S.A.*, 807 F.2d 820, 826 (9th Cir.), *cert. denied,* 482 U.S. 906 (1987) This is the central principle that enabled the United States and other governments to try, convict and execute German government officials on German soil—notwithstanding any notion of sovereign immunity. It is this same principle that should govern the interpretation of § 1605(a)(1) here as well.

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[4] *United States v. Goering,* 6 F.R.D. 69 (1946) ("*The Nuremberg Decision*").

The history of German atrocities during World War II is well documented in *The Nuremberg Decision.* Millions of Jews, like Mr. Princz's family, were captured, tortured and systematically slaughtered by the German government. For example, the commandant of Auschwitz from May, 1940 to December 1, 1943, testified that during this period *at Auschwitz alone,* approximately 2,500,000 people were exterminated and another 500,000 died of starvation and disease. *The Nuremberg Decision,* 6 F.R.D. at 129. Mr. Princz and two of his brothers were enslaved at Auschwitz—only Mr. Princz survived. Adolph Eichmann, who was in charge of the German plan to "liquidate" the Jews, "estimated that the policy pursued resulted in the killing of 6,000,000 Jews, of which 4,000,000 were killed in the extermination institutions." *Id.* at 130.[5] Mr. Princz was the sole member of his family to survive the Holocaust.

The Nuremberg tribunal found that the conduct giving rise to Mr. Princz's claims here constituted "war crimes" and "crimes against humanity," as defined in Article 6 of the Nuremberg Charter. *Id.* at 77-78. The tribunal also confirmed that its Charter was "the expression of international law existing at the time of its creation," *id.* at 107, reflecting "customs and practices of states which gradually obtained universal recognition." *Id.* at 109. Germany's conduct was accurately characterized as being "in complete disregard of the elementary dictates of humanity." *Id.* at 113. The documented atrocities against the Jewish people were "part and parcel" of German policy, *id.* at 128, demonstrating quite clearly that the German government was "a soulless regime." *Id.* at 118. Germany's steadfast assertion of sovereign immunity in the *Princz* case similarly reflects a cold and callous disregard for the human dignity of perhaps the only American survivor of the Nazi concentration-camps.

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[5] While the Amici believe that a court could properly take judicial notice of the Nuremberg tribunal's factual findings, these specific facts bear repeating here because they are *admissions* of German officials. Unfortunately, there are individuals and organizations, commonly known as "Holocaust Revisionists" or "Holocaust Deniers," that still believe the Holocaust never happened, and is instead, a fabrication by Jewish groups. *See McCalden v. California Library Ass'n,* 955 F.2d 1214, 1221, 1230-31 (9th Cir. 1990), *cert. denied,* 112 S. Ct. 2306 (1992).

Mr. Princz has alleged that Germany persecuted him on religious grounds, enslaved him, and subjected him to inhumane treatment in German concentration camps. Germany simply murdered his other family members. All of the above-described conduct giving rise to Mr. Princz's claims violated the *jus cogens* or "peremptory norms"[6] of international law.

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[6] Interestingly, the German Federal Constitutional Court described "peremptory norms" as follows:

> The quality of such peremptory norms [*jus cogens*] may be attributed only to such legal rules as are firmly rooted in the legal conviction of the community of nations and are indispensable to the existence of the law of nations as an international legal order and the observance of which can be required by all members of the international community.

Judgment of Apr. 7, 1965, Bundesverfassungsgericht, BVerfGE, W. Ger., *quoted* in Stefan Riesenfeld, *Jus Dispositivum and Jus Cogens in International Law: In the Light of a Recent Decision of the German Supreme Constitutional Court,* 60 Am. J. Int'l L. 511, 513 (S. Riesenfeld trans. 1966).

Germany's assertion of sovereign immunity in the *Princz* case flies in the face of its own apparent judicial recognition that certain conduct is so dispicable and universally denounced by the entire civilized world that other nations can sanction the offending nation for that conduct.

CONCLUSION

The Amici believe that the United States courts have a compelling interest in adjudicating legitimate civil claims brought by an American citizen against Germany arising from unspeakable violations of the most basic and universally recognized standards of international law. As an American, Mr. Princz deserves his day in an American court, and § 1605(a)(1) of the FSIA provides a basis for jurisdiction here. By its abhorrent conduct, Germany forfeited whatever immunity it might otherwise have had.

For each and all of these reasons, this Court should grant review. The appellate court's split decision raises issues of great national importance beyond the narrower interests of the litigants. This is why the Amici have asked for leave to file this brief, and why this Court should grant the Petition for Writ of Certiorari.

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In the

Supreme Court of the United States

OCTOBER TERM, 1994

HUGO PRINCZ,
Petitioner,
v.

THE FEDERAL REPUBLIC OF GERMANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF INDIVIDUAL PROFESSORS OF INTERNATIONAL LAW AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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MOTION OF INDIVIDUAL PROFESSORS OF INTERNATIONAL LAW FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

The undersigned professors of international law hereby respectfully move for leave to file the attached brief *amicus curiae* in this case. The written consent of counsel for Petitioner Hugo Princz has been obtained. The written consent of counsel for Respondent the Federal Republic of Germany was requested but refused.

These professors collaborated *ad hoc* as an informal group in the presentation of this brief, in order to present their concerns to the Court as it considers whether to grant certiorari in this matter. The professors present their views in their individual capacities as international legal scholars only, and not as representatives of the educational institutions to which they are attached.

As professors of international law, the *amici* have followed the developing jurisprudence of the Foreign Sovereign Immunities Act ("FSIA") with great interest, and increasingly, with great concern as well. In recent years, the courts have struggled to determine the appropriate scope of the FSIA, and in particular the scope of the implied waiver provision. The application of this statute has been inconsistent at best, with various lowers courts alternatively embracing and rejecting both the legislative history and standards of international law as tools of construction.

The brief of *amici* in support of petitioner presents the issues raised in this case in broader historical perspective, and focuses on the future ramifications of the Court of Appeal's decision if this Court declines to grant a writ of certiorari. The *amici* thus place this case in its analytical context in a manner which neither petitioner nor respondent could, and in this sense believe that this brief contains a more complete presentation of the interrelationship between federal law and international law.

The *amici*'s interest in this case transcends mere academic curiosity, as the role of international legal scholars in the progressive development of international law has been widely recognized, even by the International Court of Justice. *See* Statute of the International Court of Justice, Art. 38. After evaluating trends in the interpretation of the FSIA over the course of several years, it has become apparent that the lower courts feel the lack of general guiding principles in applying the waiver provision, § 1605(a)(1). This case provides an opportunity to provide such guidance, as it presents difficult issues concerning the interrelationship between federal law and international law which will recur with the ever-expanding transnational commercial opportunities and the growing socio-economic interdependence between states.

Some of the undersigned professors have been involved in this litigation since mid-1993, when they joined a brief *amicus curiae* in support of Plaintiff-Appellee Hugo Princz, prepared by the Anti-Defamation League of B'nai B'rith, filed in the United States Court of Appeals for the District of Columbia Circuit (Nos. 92-7247 and 93-7006 (consolidated)). Since that time, this case has attracted the attention of other professors involved in international law. As Respondent had granted its consent to the participation of various faculty members of the American University's Washington College of Law in the appellate proceedings below, the undersigned *amici* do not understand why Respondent would prefer to exclude them from participating before this Court.

Amici believe that, as stated above, their perspective of the issues presented for review in this case is sufficiently different as to be of assistance to this Court in determining whether to grant a writ of certiorari. The Motion for Leave to File the attached brief should be granted.

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QUESTIONS PRESENTED

I. Whether the Foreign Sovereign Immunities Act incorporates the preexisting federal common law of foreign sovereign immunity, including applicable standards of international law?

II. Whether the Foreign Sovereign Immunities Act provides immunity for acts of genocide and other violations of international law for which the international community denies the right of sovereign immunity?

III. Whether the Foreign Sovereign Immunities Act provides jurisdiction over a suit by an American citizen who alleges that he was injured by a foreign state, within its territory, by that government's acts of genocide and other acts in violation of international law, for which the international community denied the right of sovereign immunity.

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---

BRIEF OF INDIVIDUAL PROFESSORS OF INTERNATIONAL LAW AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICI*

The *amici* are several professors of international law at various universities throughout the nation. They have collaborated in the production of this brief in order to present their concerns to the Court as it considers whether to grant certiorari in this matter. The *amici* express these views in their individual capacities as international legal scholars only, and not as representatives of the educational institutions to which they are attached.

As professors of international law, the *amici* have followed the developing jurisprudence of the Foreign Sovereign Immunities Act ("FSIA") with great interest, and increasingly, with great concern as well. In recent years, the courts have struggled to determine the appropriate scope of the implied waiver provision. Their conclusions have usually hinged upon a reference to three examples contained in the legislative history of the Act. With few exceptions, the courts have been reluctant to find implied waivers of foreign sovereign immunity on other bases, including those provided by international law.

The legislative history of the Act specifically stated that the intent of Congress was, *inter alia*, to codify the federal law of foreign sovereign immunity. That jurisprudence by necessity included international law, a fact that Congress expressly recognized by incorporating into the new statutory regime standards of international law, especially in §§ 1330(a) and 1604, concerning the general denial of immunity for violations of treaty law.

Although some judicial opinions have discounted the role of international standards with regard to implied waivers under § 1605(a)(1), other opinions have reflected those international standards. The disparity in approaches demonstrates genuine uncertainty as to the scope of the implied waiver provision in the FSIA, and the role of these international standards in statutory construction. The resolution of this disparity in approaches will prevent confusion among the courts called upon to determine these issues.

The majority's holding below that the implied waiver provision of the Foreign Sovereign Immunities Act does not provide jurisdiction over Hugo Princz' claim against the Federal Republic of Germany constitutes the most egregious rejection of standards of international law in the interpretation of the implied waiver provision of the FSIA. Such an unqualified rejection of international law as a canon of statutory construction provided the impetus for the *amici* to join together in order to urge this Court to clarify the jurisprudence by providing guiding principles for the interpretation of the implied waiver provision.

REASONS FOR GRANTING THE WRIT

This Court should grant a writ of certiorari to resolve the intolerable conflict between the Court of Appeals' interpretation of the implied waiver provision of the Foreign Sovereign Immunities Act and the requirements of international law, which have been incorporated as law of the United States and have been recognized by this Court.

Judge Ginsburg, writing for the majority below, essentially concluded that even intentional and express violations of *jus cogens*, the highest peremptory norms of international law, could never be construed as an implied waiver of immunity under the Foreign Sovereign Immunities Act (Pet. App. at 18a-20a). The majority below recognized that this issue, presented by the *amici*[1] in the appellate proceeding, appeared to be one of first impression. The majority noted, however, that the Ninth Circuit had made a general pronouncement that "[t]he fact that there has been a violation of *jus cogens* does not confer jurisdiction under the FSIA" when considering a torture claim suffered by a non-U.S. citizen arising from acts occurring within the foreign state of which the claimant was a national. *Siderman de Blake* v. *Republic of Argentina*, 965 F.2d 699, 719 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1812 (1993) (Pet. App. at 18a). The facts of *Siderman de Blake* do not sufficiently coincide with the facts of this case so as to justify the majority's reliance on that general pronouncement; nor is this a case in which a U.S. citizen was subjected to excessive force by the police of a foreign country. *Saudi Arabia* v. *Nelson*, 113 S. Ct. 1471 (1993). This case involves a U.S. citizen who, solely by reason of his religion, was subjected to slave labor and subsequently slated for extermination by an enemy of the United States, all in violation of universally accepted principles of international law.

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[1] The *amici* in the appellate proceeding were the Anti-Defamation League of B'nai B'rith, the International Association of Jewish Lawyers and Jurists, and faculty members of the American University's Washington College of Law in their individual capacities.

The majority's rationale for not finding an implied waiver was based upon its determination that an implied waiver requires an intentional act. It claimed to distill this conclusion from previous opinions of various circuit Courts of Appeals. *See, e.g.*, *Drexel Burnham Lambert* v. *Committee of Receivers*, 12 F.3d 317, 326 (2d Cir. 1993); *Foremost McKesson, Inc.* v. *Islamic Republic of Iran*, 905 F.2d 438, 444 (D.C. Cir. 1990); *Joseph* v. *Office of Consulate General*, 830 F.2d 1018, 1022 (9th Cir. 1987); *Frovola* v. *Union of Soviet Socialist Republics*, 761 F.2d 370, 377 (7th Cir. 1985); *Zernicek* v. *Petroleos Mexicanos*, 614 F. Supp. 407, 411 (S.D. Tex, 1985), *aff'd* 826 F.2d F.2d 415 (5th Cir. 1987). The majority below seems to have concluded that the examples of implied waivers contained in the legislative history were exhaustive, although such a position is not compelled by the legislative history. H.R. REP. 1487, 94TH CONG., 2D SESS. 18, *reprinted in* 1976 U.S.C.C.A.N. 6604, 6617.

The majority then concluded that although the Third Reich's government realized that it had violated *jus cogens* norms for which it would be held responsible, and although the present German government repeatedly indicated its abhorrence for the actions committed by Germany during the Holocaust and made attempts to compensate its victims, there was no indication "that either the present government of Germany or the predecessor government of the Third Reich actually indicated, even implicitly, a willingness to waive immunity for actions arising out of Nazi atrocities" (Pet. App. at 19a). Yet these actions, though not reflective of an express waiver, do indicate recognition by Germany of its violations of international law and that these intentional acts are not protected by sovereign immunity, and thus constitutes an implied waiver of any of the protections granted by the FSIA.

International law has long since resolved the paradox of sovereignty and sovereign violations of such law, especially *jus cogens*. Unfortunately the majority was unable to resolve that paradox, and concluded that international law must yield to supposed dictates of Congressional legislation, even where legislation should be construed in a manner consistent with international law. *Weinberger* v. *Rossi*, 456 U.S. 25, 32 (1982); *McCulloch* v. *Sociedad Nacional*, 372 U.S. 10, 21-22 (1963); *MacLeod* v. *United States*, 229 U.S. 416, 434 (1913); *The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

When a sovereign's act violates *jus cogens*, it loses its legitimacy and sovereign or protectable character under international law. *See Berg* v. *British and African Steam Navigation Co.*, 243 U.S. 124, 153-156 (1917) [hereinafter "*The Appam*"]; *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283, 350-55 (1822); *United States* v. *La Jeune Eugenie*, 26 F. Cas. 832, 846 (C.C.D. Mass. 1821) (No. 15,551); *Letelier* v. *Republic of Chile*, 488 F. Supp. 665, 673 (D.D.C. 1980); 9 Op. Att'y Gen. 356, 362-63 (1859); EMERIC DE VATTEL, THE LAW OF NATIONS Bk. 1, Ch. 4, § 54 (Leiden, 1758). Universally denounced violations of *jus cogens*, such as genocide, give rise not only to prescriptive jurisdiction, but also to enforcement or adjudicative jurisdiction. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 404, 423, 702 & comments d, n. *See also* Jordan J. Paust, *Suing Saddam: Private Remedies for War Crimes and Hostage-Taking*, 31 VA. J. INT'L L. 351, 371-74 (1991) (and cases cited therein). This basis of jurisdiction has been widely accepted by the international community, particularly in its establishment of the Nuremberg War Crimes Tribunal. Thus, international law permits both prescriptive and enforcement or adjudicative jurisdiction for violations of *jus cogens*. Congress, however, in the FSIA, indicated the need for either an express or implied waiver of sovereign immunity to assert jurisdiction under § 1605(a)(1). The question thus arises whether Congress intended § 1605(a)(1) to require an intentionality in an express or implied waiver of immunity when there is a violation of *jus cogens* by a foreign sovereign, or whether deliberate acts with knowledge of their violation of international law in themselves constitute an implied waiver.

Courts of the United States have long recognized that the standards of international law are incorporated as law of the United States. *Ex parte Quirin*, 317 U.S. 1, 27-28 (1942); *The Nereide*, 13 U.S. (9 Cranch) 388, 422-23 (1815); *Ware* v. *Hylton*, 3 U.S. (3 Dall.) 199, 227, 237, 272, 276, 279 (1796); *Talbot* v. *Janson*, 3 U.S. (3 Dall.) 133, 156, 159-61 (1795); *Filartiga* v. *Pena-Irala*, 630 F.2d 876, 886-87 (2d Cir. 1980); *Henfield's Case*, 11 F. Cas. 1099, 1101-02, 1107 (C.C. Pa. 1793) (No. 6,360); *see also* 1 Op. Att'y Gen. 68, 69 (1797) ("the common law has adopted the law of nations in its fullest extent and made it a part of the law of the land"); 1 Op. Att'y Gen. 26, 27 (1792) ("the law of nations, although not specifically adopted by the Constitution or any municipal act, is essentially a part of the law of the land"). In codifying and incorporating the federal customary law of foreign sovereign immunity, Congress stated that the judiciary is to evaluate "claims [of sovereign immunity] by foreign states on the basis of a statutory regime which *incorporates standards recognized under international law.*" H.R. REP. NO. 1487, 94TH CONG., 2D SESS. 12, 14, *reprinted in* 1976 U.S.C.C.A.N. 6604, 6613; *see also* 28 U.S.C. §§ 1330(a) 1602, 1604, 1609. Therefore standards of international law should be employed by the judiciary as it interprets the waiver provision of the Foreign Sovereign Immunities Act.

At the outset of this century, this Court affirmed that

> International Law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly

presented for their determination.

The Paquete Habana, 175 U.S. 677, 700 (1900) (citing *Hilto* v. *Guyot*, 159 U.S. 113, 163 (1895). Furthermore, this Court has indicated that

> An Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and, consequently, can never be construed to violate . . . rights . . . further than is warranted by the law of nations . . . .

The Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.). *See also Talbot* v. *Seeman*, 5 U.S. (1 Cranch) 1, 43 (1801); *Ross* v. *Rittenhouse*, 2 U.S. (2 Dall.) 160, 162 (Pa. 1792); *The Resolution*, 2 U.S. (2 Dall. 1, 4 (1781); 11 Op. Att'y Gen. 197, 199-300 (1865); 9 Op. Att'y Gen. 356, 362-63 (1859); *The Ship Rose*, 36 Ct. Cl. 290, 301 (1901); *The Schooner Nancy*, 27 Ct. Cl. 99, 109 (1892). The majority's interpretation of the FSIA, inconsistent with international law, would grant immunity to sovereigns that violate fundamental norms of international law, i.e., *jus cogens*, acts which every country has condemned. Such an intent on the part of Congress cannot be proven, is certainly not clear and manifest and therefore cannot be a proper construction of the FSIA.

The District Court held that the acts of Nazi Germany were those of an outlaw state, and that as such Germany was estopped to assert the privilege of sovereign immunity under the FSIA (Pet. App. at 57a, 59a - 60a). On appeal from that decision, Judge Wald, in dissent, recognized the absence of immunity and also found that such immunity was inconsistent with the teachings of this Court. Judge Wald indicated that although the sole basis of obtaining jurisdiction over a foreign state is under the FSIA, *Argentine Republic* v. *Amerada Hess*, 488 U.S. 428, 434 (1989), to disallow an action would be inconsistent with the standards of international law which Congress intended to incorporate into the FSIA. Judge Wald also found that the facts here involved indicated the existence of an implied waiver of Germany's sovereign immunity.

The majority opinion presents an intolerable conflict with this Court's opinions in *The Appam*, *Hilton* v. *Guyot*, *The Santissima Trinidad*, *The Nereide*, *Talbot* v. *Janson*, *Talbot* v. *Seeman* and *The Charming Betsy*. By selective reading of the legislative history, the majority below rejects the fundamental purpose of Congress in establishing the FSIA — to codify the existing federal law of foreign sovereign immunity in a manner which incorporates international standards and serves the interests of justice. *See* § 1602. The restrictive construction of the FSIA by the majority below is inconsistent with the principles of international law. As Professor Paust has noted,

> "sovereignty is conditioned on obedience to international law, the law upon which sovereignty rests . . . Similarly, judicial deference . . . is rightly conditioned upon foreign state respect for international law . . . [and] an illegal act is incapable of protection by the judiciary. To hold otherwise would be to further illegality, give it legal effect, and fulfill its illegal nature at the hands of a court of law. This a court cannot do.

Jordan J. Paust, *Draft Brief Concerning Claims to Foreign Sovereign Immunity and Human Rights: Nonimmunity for Violators of International Law under the FSIA*, 8 HOUS. J. INT'L L. 49, 59 (1985); *see also id.* at 57-65, *passim*. The majority, by refusing to find an implied waiver of immunity has in effect impermissibly "thwart[ed] a universal sanctions effort directed at international criminal activity." Jordan J. Paust, *Federal Jurisdiction over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law under the FSIA and the Act of State*

Doctrine, 23 VA. INT'L L. REV. 191, 226 (1983); *see also id.* at 221-27.

This Court need not further such illegality. Especially after *The Santissima Trinidad* and *The Appam* (citing *The Santissima Trinidad*, 243 U.S. at 154-55), Germany must have known and expected that its intentional acts in serious and criminal violation of international law were outside the sphere of protectable sovereign acts, that it could be held responsible, and that it could be judged by law and in fora other than its own, even including, per *The Appam* and *The Santissima Trinidad*, courts of the United States. Such knowledge and expectation pertains especially when there is an implied waiver of immunity, for it is the state's intentional and illegal conduct coupled with such knowledge and expectation that results in the implicit waiver of protection. What state could rightly expect to be immune with respect to serious, criminal violations of international law?

Further, Congress did not require that a waiver be express; and thus, tests cannot exclude implicit waivers. For example, Congress recognized that consent to arbitration or to submit to laws of some other state constitutes an implicit waiver. As its attempts to destroy evidence of its violations of international law demonstrate, Germany clearly understood that it could be judged according to principles of recognized international law, the law that forms the very basis for any claimed immunity. The existence of such law has been recognized by the Constitutional Court of Germany in its decision of April 7, 1965, Bundesverfassungsgericht, BVerfGE, W. Ger. *quoted in* Stefan Riesenfeld, *Jus Dispositivum and Jus Cogens in International Law: In the Light of a Recent Decision of the German Supreme Constitutional Court*, 60 AM. J. INT'L L. 511, 513 (S. Riesenfeld trans. 1966).

Although this matter would appear to be a case of first impression, the underlying issue presented is well "beyond the academic or the episodic", *Rice* v. *Sioux River Cemetery*, 349 U.S. 70, 74 (1955), and therefore is worthy of this Court's consideration. As travel within the international community is facilitated by improved technology and the demise of politically based travel restrictions, and is encouraged by expanding business opportunities, the decision of the majority below would leave citizens of the United States at risk of becoming victims of state-sponsored terrorism and other violations of the fundamental norms of international law, just as the Princz family was. Less than fifty years after Nuremberg, the international community once again has found the need for a war crimes tribunal.

In other instances where Congress has expressly incorporated international standards into legislation, this Court has recognized the prudence of identifying the relevant legal precepts and clarifying the appropriate method of their application. *See, e.g.*, *Ex parte Quirin*, 317 U.S. at 7-28; *Hilton* v. *Guyot*, 189 U.S. at 163; *United States* v. *Smith*, 18 U.S. (5 Wheat.) 153, 160-62 (1820); *The Nereide*, 13 U.S. (9 Cranch) at 421. The majority opinion seems to be contrary to the argument of the Office of the Solicitor General, in *Filartiga* v. *Pena-Irala*, that "it should be clear that a court is not at liberty to enforce its own views of policy under the guise of interpreting the requirements of international law." Brief of the United States as *Amicus Curiae*, *Filartiga* v. *Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), *reprinted in* 19 I.L.M. 583, 604 (1980) (*Cf.* Pet. App. at 20a n.1) .

This Court has provided guidance to the lower courts by reviewing some other issues raised under the Foreign Sovereign Immunities Act. Accepting the FSIA as the sole basis of jurisdiction over foreign states, a uniform interpretation the Act consistent with legislative intent and international law is of foremost importance. Such guidance in relation to the jurisprudence of the implied waiver provision and of the extent of the FSIA is urgently needed. Lower courts are struggling with the application of the implied waiver provision to variants of the *Princz* situation, and with the question how far United States law would prevent a U.S. citizen obtaining compensation for the activities of a foreign government which has violated *jus cogens*. This case gives the Court the opportunity to clarify the parameters of the FSIA.

CONCLUSION

If the majority opinion is permitted to stand and Germany retains immunity from this suit, then the teachings of this Court regarding the applicability of international law will be contradicted. The result would be that the law of the United States recognizes an immunity which the international community has already determined cannot be retained. In effect, the majority opinion not only generally ratifies the Nazi campaign of genocide and barbarism as a legitimate sovereign activity — but even ratifies such acts when committed against a U.S. citizen. This Court should exercise its power of judicial supervision to resolve the intolerable conflict this opinion presents in the light of this Court's teachings and the expressed intent of Congress.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

HUGO PRINCZ,
Petitioner,

v.

THE FEDERAL REPUBLIC OF GERMANY,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Rather than focusing on the certworthiness of the issues presented for review, Germany contends that certiorari should be denied because Mr. Princz seeks greater compensation than has been paid to other survivors — or because Mr. Princz somehow implies that his suffering was greater than that of other survivors — or because Mr. Princz insinuates that his U.S. citizenship entitles him to something extra — or because payment to Mr. Princz would be unfair to other survivors. These contentions are as inapposite to the legal arguments presented in the Petition for Certiorari as they are offensive.[1] Mr. Princz is not seeking anything more than he would have received had he begun receiving payments in the 1950s, as did other survivors. He does not argue that his U.S. citizenship makes him more deserving; he simply argues that it should not make him ineligible for compensation.[2] Judge Wald appropriately characterized Germany's treatment of Mr. Princz' requests for reparations, stating that:

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[1] Moreover, these contentions are based in large part on materials included in Respondent's Addendum, which is a *melange* of extra-record and of-record documents and correspondence postdating even the filing of the Petition for Certiorari herein.

> For decades [following his liberation], using the available international compensation mechanisms, Princz sought unsuccessfully to obtain reparations from Germany for both the loss of his pension and the physical and mental suffering inflicted upon him during the war. Despite its public professions of penitence for the horrors of the Holocaust, however, Germany repeatedly relied on technicalities such as Princz' citizenship at the time of his enslavement to deny him either a pension or any restitution for his immense suffering. Ironically, had Princz not been an American

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[2] Germany admits that Mr. Princz' U.S. citizenship made him ineligible for reparations in 1953 when the program began, Br. Opp. 3-4, but argues that he would have been eligible for reparations under the 1965 amendment to the Program. Br. Opp. 5. Mr. Princz takes exception to the latter. The 1965 amendment did nothing more than reopen a small portion of the 1953 program to those who had previously been eligible but had failed to file. By Germany's own written admission, even if Mr. Princz had been eligible in 1965 and filed for reparations, he would only have received a one-time payment of DM 10-15000 [approx. $2000 - $3000]. R.Add. 17a.

Despite numerous requests by petitioner's counsel, Germany has never entered proof of foreign law into the record concerning this disputed question of fact. In any event, at this stage of the proceedings, the facts must be taken in a light most favorable to Mr. Princz. *See* Pet. App. C, 24a n.1 (Wald, J., dissenting, citing *Moore* v. *Agency for Int'l Dev't*, 994 F.2d 874, 875 (D.C. Cir. 1993)).

> citizen at the time of the Holocaust, he would have received compensation.

Pet. App. C., 25a (concurring with the District Court's finding of fact at Pet. App. G, 52a).

Germany, for a variety of reasons, argues that the United States implicitly supports its claim of sovereign immunity in this case. The facts do not bear this out. Germany sought the assistance of the Department of State at the appellate level in this case. The Department refused, and responded by admonishing Germany to settle Mr. Princz' "legitimate and compelling claim." United States Department of State's Response to Note Verbale No. 22/93 (April 13, 1993) (attached to Appellee's Brief below at p. 10 of the addendum).

The Department of State's refusal to assist Germany in this proceeding is consistent with past actions and pronouncements of the Executive Branch. When the Nuremberg War Crimes Tribunal was convened, the United States and the Allied Powers rejected claims of immunity by German state officials based upon the immunity of the state. *See generally The Nurnberg Trial*, 6 F.R.D. 69 (1946). When a U.S. Court of Appeals initially declined to exercise jurisdiction over a claim seeking the restitution of property expropriated by Germany under its religious persecution laws, the Department of State issued an opinion letter, which stated: "The policy of the Executive . . . is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials." Department of State Press Release No. 296 (April 27, 1949) (attached to Appellee's Brief below at pp. 12-14 of the addendum); *Bernstein* v. *N.V. Nederlandsche-Amerikaansche Stoomvart-Maatschappij*, 210 F.2d 375 (2d Cir. 1954) (per curiam).

Finally, Germany also argues that Mr. Princz is currently eligible to receive a bridge payment of $3400 and a monthly pension of $340 commencing in August 1995. Br. Opp. 5-6. This "eligibility," however, simply reflects another instance of Germany's recalcitrance. Diplomatic entreaties on behalf of Mr. Princz made by the Department of State during the Reagan, Bush and Clinton Administrations have been rebuffed by the German government. This suit was commenced only after all then-available diplomatic remedies had been exhausted without Germany agreeing to give Mr. Princz reparations. It was not until the district court denied Germany's immunity that Germany directed its agent in the United States to deem Mr. Princz eligible for these *de minimis* benefits. The settlement offer was made not with the expectation that Mr. Princz would find it acceptable, but as a vehicle for creating an issue by which Germany could move the district court for reconsideration. Neither Mr. Princz nor the Department of State found Germany's settlement proposal worthy of serious consideration.[3]

This case is not about petitioner's supposed avarice. Rather, it is about the availability of a remedy of last resort when a foreign state deliberately inflicts injuries upon a United States citizen, in flagrant violation of the most fundamental norms of international law, and subsequently refuses to enter into negotiations with the United States government to arrange satisfactory compensation. Germany claims it cannot afford to single out Mr. Princz for treatment different from those similarly situated. Br. Opp. 19-20. Yet, that is precisely what Germany has done for more than 40 years by refusing to give him the same reparations other survivors, who made timely application to the 1953 program, have received.[4]

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[3] Germany also suggests that the American Jewish Community does not support Mr. Princz' views in this matter. Br. Opp. 4 (presenting list of Jewish organizations compiled from extra-record materials found at R.Add. 30a). This misleading impression is easily dispelled by the *amicus* brief submitted by the Anti-Defamation League of B'nai B'rith, the International Association of Jewish Lawyers and Jurists, and the National Jewish Community Relations Advisory Council (to the filing of which Germany has inexplicably refused its consent).

Contrary to the position advanced in Germany's Brief in Opposition, the questions presented for review exist and are important.[5] This Court should issue a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

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[4] Following the Second World War Germany was not recognized as a sovereign power. As a condition of the return of sovereignty, Germany made a commitment to administer its reparations programs on a nondiscriminatory basis. Convention on the Settlement of Matters Arising out of the War and the Occupation, Ch. 4, 6 U.S.T. 5652, 5665-6, TIAS 3425 (23 October 1954). Yet, Germany continues to discriminate against Mr. Princz based solely upon his U.S. citizenship.

[5] As in this case, the collateral order doctrine and the Foreign Sovereign Immunities Act have historically posed difficult questions which this Court has chosen to resolve. *See, e.g.*, *Swint* v. *City of Wadley, Alabama*, 5 F.3d 1435 (11th Cir. 1993), *on reh'g*, 11 F.3d 1030 (11th Cir. 1994), *cert. granted sub nom. Swint* v. *Chambers County Commission*, 114 S. Ct. 2671 (1994) (No. 93-1636) (continuing problems concerning the scope of the collateral order doctrine); *Republic of Argentina* v. *Weltover, Inc.*, 112 S. Ct. 2160 (1992) (reversing fifteen years of lower court interpretations of the Foreign Sovereign Immunity Act commercial activity exception's "direct effect" requirement); *see also* Brief of Individual Professors of International Law as *Amici Curiae* Supporting Petitioner (discussing the importance of international law as a canon of statutory construction) (to the filing of which Germany has refused its consent).

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